81-2200

No. _____

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

THE MINERS AND MERCHANTS BANK
OF ROUNDUP, MONTANA,

Petitioner,

vs.

L. D. STENSVAD, personally and as representative of the investing shareholders of AGRI-SERVICES, INC., M-V ENTERPRISES, INC., M&S CATTLE FEEDERS, and L. D. STENSVAD CATTLE CO., all Montana corporations,

Respondent.

ON WRIT OF CERTIORARI FROM
THE SUPREME COURT OF THE STATE OF MONTANA

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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1. QUESTION PRESENTED

Whether the decision of the Supreme Court of the State of Montana constitutes a deprivation of Petitioner's property without due process of law, contrary to the 5th and 14th Amendments to the US Constitution when it held that:

1. Interest on promissory notes owed Petitioner under its counterclaim was available to Petitioner as a matter of law, but refused to so grant or award that interest where the amount of such interest was a stipulated fact;

2. Respondent Stensvad was entitled to the value of certain real property as damages for conversion of real property, without reference to and in spite of Petitioner's prominent and properly-raised claim that no jurisdiction, including Montana, provides for the conversion of real estate or damages therefore.

3. Respondent Stensvad was entitled

to damages for the value of certain real and personal property, without reference to and in spite of Petitioner's prominent and properly-raised claim that such a holding was contrary to a previous ruling of the same trial court involving the same parties and property and therefore was barred under the doctrine of res judicata?

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4. OPINIONS BELOW

The opinion of the Supreme Court of the State of Montana is reported at 640 P.2d 1303, printed in Appendix hereto, infra, page 86.

A related case appears at: Stensvad v. Miners and Merchants Bank, 598 P.2d 1083.

5. JURISDICTION

The opinion of the Supreme Court of the State of Montana (Appendix, infra, page 86) sought to be reviewed was entered on January 7, 1982. A timely Petition for Rehearing was denied on February 25, 1982. (Appendix, infra, page 187). The jurisdiction of the Court is invoked under the Judicial Code, 28 United States Code, Section 1257(3).

6. STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The case involves the two following

Amendments to the United States Constitution:

Amendment 5

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

Amendment 14(1)

"1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

7. STATEMENT OF THE CASE

A. Facts Material to Federal Question Presented.

The case involves a banking relationship between the Petitioner Bank and L. D. Stensvad, who operated a feedlot operation through four corporations.

As of November 11, 1971, certain Promissory Notes secured by real and personal property, were due, owing, and unpaid from the four corporations to the Bank in the amount of $1,022,325.73. (Appendix, infra, Requests for Admissions, No. II (16) at page 29, deemed admitted by court order.)

On November 16, 1971, Otto Stensvad served a Complaint in a related case (Stensvad v. Miners & Merchants Bank, 598 P.2d 1083) seeking exoneration from certain guarantees he personally made to the Bank in connection with loans made to . .e various corporations.

The Bank, thereafter, embarked on a course of foreclosure and repossession and sale of the assets, real and personal, of the four corporations.

With respect to all real estate of the four corporations, the Bank proceeded by way of a foreclosure action separate from the instant case, but involving the same parties and property, resulting in a judgment and decree in the Bank's favor. (Montana Nat'l. Bank of Roundup vs. M-V Enterprises, Inc., No. 7072, Decree and Judgment, Appendix, infra, page 1).

Notice of the taking of possession of the feedlot and the entire operation had been sent by the Bank and received by L.D. Stensvad on November 19, 1971. (Appendix, infra, Requests I (23), pages 24 & 25. The Bank in a separate action from the instant case, but involving the same parties and property, filed a claim and delivery action for recovery of personalty covered by security agreements, and in that action, obtained a court-authorized sale (Appendix, infra, page 14) and a subsequent judgment (Appendix, infra, page 16). At no point in the process of the

Bank's repossession, sale and foreclosure did the Bank proceed other than in a lawful manner and at all points where required, the Bank proceeded via the court actions separate from the instant case.

The instant case was brought by Stensvad in the same court of original jurisdiction claiming the Petitioner Bank breached an oral contract to loan more money - sufficient money to allow the feedlot operation to succeed. The Trial Court found such a contract and found a breach of the contract took place on October 7, 1971. The Trial Court, and later the Supreme Court, ignored Petitioner Bank's contention that no breach existed because the loans were well over Stensvad's self-imposed limit, that numerous indications of insolvency constituted a change of circumstances, and that subsequent loans of $218,000 constituted a waiver and subsequent accommodation.

The Trial Court awarded Stensvad the sum

of $2,142,742 on his claim based primarily on conversion of the property that was taken by the Bank by legal foreclosure. It awarded the Bank the sum of $1,868,138 on its Counterclaim based on the unpaid promissory notes. This resulted in a net judgment to Stensvad of $274,604 after offset for the Bank's Counterclaim. (Appendix, infra, Findings, page 45; Findings, page 49; Nunc Pro Tunc Order, pages 84-85). Of the amount awarded Stensvad, $814,936 was for the conversion of real estate, namely, the feedlot and elevators. Of the amount awarded the Bank, $845,813 was for interest on the Promissory Notes. The trial court ignored the Judgments and Orders in the foreclosure cases brought by the Bank in the same trial court and computed all interest from an arbitrary date, namely, November 11, 1971, instead of taking the amount of the Judgments from the date of those Judgments.

The Montana Supreme Court reduced the

amount of damages awarded Stensvad to $1,206,046 and reduced the amount of damages awarded the Bank to $1,022,325, for a net judgment of $183,721 to Stensvad.

The Montana Supreme Court and court of original jurisdiction thus acted as follows:

Stensvad Claim	Trial Court	Supreme Court
1. Conversion of personal property	$354,111	$354,111
2. Conversion of cattle a. conversion of cattle, $277,102 b. profit by bank on sale of cattle, $104,898	$382,000	$382,000
3. Conversion of feedlot and elevators	$814,936	$411,935
4. Mishandling of business	$ 80,000	$ 58,000
5. Lost profits	$511,695	0
	$2,142,742	$1,206,046

Bank Counterclaim	Trial Court	Supreme Court
1. Principa	$1,022,325	$1,022,325
2. Interest	845,813	0
	$1,868,138	$1,022,325
Net to Stensvad	274,604	183,721

(Appendix, infra, Supreme Court Opinion, page 102).

As to the interest disallowed by the Montana Supreme Court, the court in its opinion impliedly stated that interest would be allowable to the Bank from the date of taking of the property by the Bank until the date of application of proceeds from sale, but without explanation denied the same:

> "In view of the fact that the Stensvad property taken by the bank and sold as collateral for the indebtedness due it, exceeded in value as we have above shown the amount of the principal indebtedness, it is improper in this case to award interest to the bank on the note balances to the date of Judgment. Once the value of the collateral had been applied to the principal indebtedness through means of foreclosure and other sales, Stensvad's obligation for further interest on those notes to the extent of collection was obviously terminated. The bank is entitled to a set-off of no more than the amount of the principal indebtedness as of the date of the breach

found by the District Court." (Emphasis Supplied).

Opinion, Appendix, infra, page 130.

The Montana Supreme Court, in denying Petitioner's Request for Rehearing (Appendix, infra, page 187), reaffirmed that interest was due from date of breach to application of moneys after foreclosure but indicated that such sums were not computable from the record:

> "1. Petitioner bank contended it is entitled to a set-off for interest accrued on the principal indebtedness on the notes from the date of breach until the monies received on foreclosures by the bank were applied on the notes. We so indicated in our opinion. However, we carefully searched the record to determine the applicable amounts and dates, and were unable to identify either in any case. This court is bound by the record before us. Therefore, we held that the set-off would be the amount of principal indebtedness as of the date of the breach on facts found by the District Court."

Thereafter, Petitioner filed its "Petition for Supervision or Correction of Remittur" (sic.) (Appendix, infra, page 190) setting out its contention which was advanced

at every stage of the appeal and never contested up to this point by Respondent Stensvad, namely, that the amount of interest from the date of taking of the properties to the date of sale was proposed as a stipulation by counsel for Stensvad and so stipulated to by the Bank's counsel to be $35,962.93 after all off-sets:

January 22, 1979
2:30 P.M.

> THE COURT: All right, you may proceed. How do you want to do this, do you want to put your stipulations into the record first?
>
> MR. TOLLIVER [Counsel for Respondent Stensvad]: I guess, your honor. Let the record show that the plaintiff [Stensvad] offers to stipulate that the balance of the loans between the plaintiffs and the defendants on or about November 18, 1971, was the amount of $1,010,216.80.
>
> Do you want to stipulate to that?
>
> MR. TOWE [Counsel for Petitioner Bank]: We will so stipulate.
>
> MR. TOLLIVER: Let the record further show that the balance remaining on such promissory notes without regard to accrued interest on or about June 10, 1972, was the amount of $374,807.35, and that in arriving at that balance credit

was given against the loans from the sale of all of the personal property assets of the plaintiffs from the sale of the feedlot and elevator at Roundup and that prior to these credits being given the bank charged against the obligation of the plaintiffs expenses which the bank incurred while operating the feedlot to feed out the cattle prior to sale, and expenses incurred in conducting the sale of certain items of personal property on June 10, 1972.

Let the record further reflect that had interest been accrued in these obligations, the interest to June 10, 1972, would be $35,962.93 accrued interest.

Do you desire to stipulate to that?

MR. TOWE: Your Honor, we will stipulate as far as that goes. Are you going to stipulate as to the amounts of the proceeds actually applied against the loans?

MR. TOLLIVER: Yes.

MR. TOWE: You are coming to that. Okay. We will stipulate as to what has been said so far.

MR. TOLLIVER: Let the record further reflect, Your Honor, that in liquidating the assets of the plaintiffs, the bank received from sale of fat cattle and Mexican roping steers the sum of $520,000.00, and that from the sale of equipment and rolling stock at auction, the sum of $66,064.70; that prior to such sale the bank received from leases of elevator facilities the sum of $912.60, and that the bank bid at the sale for the feed lot and elevator at

Roundup the sum of $200,000.00.

Let me add to that that in addition certain items of other personal property were sold, which will be subject to later stipulation. I will offer to stipulate to the foregoing.

MR. TOWE: And that those sums all were applied against those loans to arrive at the $374,000 figure.

MR. TOLLIVER: Yes, the foregoing sums were assigned.

(At this time there was discussion off the record).

MR. TOLLIVER: Stipulated. Let the record further reflect that the records of the bank indicate that the bank earned a net profit by operating the feed lot from November, 1971, until the date that such operation ceased in the spring of 1972, from feeding cattle, in an amount of $104,899.73, which amount represents an increase in the total proceeds received by the bank over the proceeds that would have been received had the cattle been sold in November of 1971, after payment of all expenses.

MR. TOWE: And that that amount was applied to the debts.

MR. TOLLIVER: And that such proceeds were applied to the debts.

MR. TOWE: I will stipulate to that."

January 22, 1979, Supplemental Hearing before the court of original jurisdiction.

As noted above, the starting date for the above stipulation used the agreed-upon loan balance of November 18, 1971. And, as previously indicated herein, supra, page , the notice of the taking of possession of the feedlot and the entire operation was received by Stensvad on November 19, 1971.

In its "Order Denying Petition" (Appendix, infra, page 187), the Montana Supreme Court rejected Petitioner's claim by reiterating its contention that it could not substantiate Petitioner's contention (that the amount of interest was stipulated to) in the record. (By this time, Stensvad, for the first time, attempted to repudiate his stipulation in his answer to Petitioner's Petition for Supervision or Correction of Remittur (sic.). (Appendix, infra, page 198).)

B. Raising of Federal Question.

(1) Interest Issue.

Petitioner was awarded $845,813 in interest due on promissory notes on its counter-

claim by the court of original jurisdiction. (Findings and Conclusions, Counterclaim, March 24, 1980, Appendix herein, infra, page 45).

On cross-appeal to the Montana Supreme Court, Respondent Stensvad raised issue with the award of interest, there being no issue on appeal as to the award of the principal amount on the counterclaim.

In its opinion on the case, the Montana Supreme Court held that the Petitioner was entitled only to interest on the promissory notes from the date of the breach of an agreement to loan additional funds up to application of proceeds from sale of collateral and not up to date of judgment, but then without reasons or discussion reduced the award of $845,813 to $0. (Opinion, January 7, 1982, Appendix herein, infra, page 130).

In a timely Petition for Rehearing, Petitioner argued that Petitioner should be awarded interest from the date of breach to

the date of application of proceeds of sale because the court had said Petitioner was so entitled in its opinion. (Petition for Rehearing, Appendix herein, infra, page 136).

In denying Petitioner's request for rehearing, the Montana Supreme Court reaffirmed that interest was due from date of breach to application of moneys from sale of collateral, and for the first time indicated that the basis for the opinion was the court's conclusion that such sums were not computable from the record. (Order Denying Petition for Rehearing, Appendix herein, infra, page 187).

At or prior to that time, neither the Montana Supreme Court on its own initiative nor Respondent Stensvad had suggested or argued that the question of the determination of the amount of interest for the time period was even at issue. During oral argument and in briefs submitted, Petitioner had advanced the unquestioned point that a stipu-

lation of counsel, offered by Reponsdent Stensvad and accepted by Petitioner, existed of record, as to the amount in question, namely, $35,962.93.

After the Supreme Court of Montana's denial of the timely request for rehearing, no mechanism for further review under Montana law or court rule existed.

Petitioner thus raised for the first time in this Petition for Certiorari the federal question as to interest. Consequently, at no point did the Montana Supreme Court make reference to the federal question on interest.

(2) Res Judicata and Conversion of the Real Estate.

Respondent Stensvad was awarded by the District Court and the Montana Supreme Court, on his claim, the sum of $814,936 for the conversion of real estate. The question of conversion of real estate as not being recognized in law was regularly raised by Petitioner at all stages, never contested by

Respondent Stensvad, and never acknowledged by the Montana Supreme Court.

Respondent Stensvad was also awarded $354,111 for conversion of personal property and $277,102 for conversion of cattle, or a total of $631,213. This amount plus the $814,936, or a total of $1,446,149 was regularly and prominently raised by Petitioner as being not due because of the doctrine of res judicata, at all stages, was never contested by Respondent Stensvad, and was never acknowledged by the Montana Supreme Court.

The Opinion of the Supreme Court of the State of Montana was entered January 7, 1982, (Appendix, infra. page 86).

On January 15, 1982, Petitioner timely filed a "Petition for Rehearing" (Appendix, infra, page 136), in the Montana Supreme Court.

On January 18, 1982, Respondent filed a "Cross Petition and Response to Petition

for Rehearing" (Appendix, infra, page 162), in the Montana Supreme Court.

On January 27, 1982, Petitioner filed a "Response to Cross-Petition" (Appendix, infra, page 176), in the Montana Supreme Court. Therein, Petitioner raised for the first time the federal question presented as to the issues of res judicata and conversion of real estate:

> "Therefore, the District Court awarded damages for conversion, which this court has sanctioned, contrary to the principal of law that conversion of realty does not exist. Such a taking is a deprivation of property without due process of law under the Montana and U.S. Constitution."
>
> (Appendix, infra, page 178).

> "Therefore, Stensvad still fails to show why res judicata does not apply. Such a taking is a deprivation of property without due process of law under the Montana and U.S. Constitution."
>
> (Appendix, infra, page 179).

The Montana Supreme Court did not make reference to the federal question raised in its "Order Denying Petition for Rehearing" (Appendix, infra, page 187).

On March 10, 1982, Petitioner filed a "Petition for Supervision or Correction of Remittur" (sic.) (Appendix, infra, page 190) with the Montana Supreme Court. In its "Order Denying Petition" entered March 25, 1982, the Montana Supreme Court did not refer to the federal question raised.

8. REASONS FOR GRANTING THIS WRIT

A.

THE RESULTS OF THE MONTANA SUPREME COURT ACTION DENY PETITIONER'S PROPERTY WITHOUT DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS.

(1) BY RULING THAT PETITIONER WAS ENTITLED TO INTEREST ON ITS PROMISSORY NOTES TO DATE OF SALE, PETITIONER'S RIGHTS BECAME FIXED. TO THEN DENY THIS INTEREST IN SPITE OF UNCONTROVERTED STIPULATED FACTS DENIED PETITIONER A REAL OPPORTUNITY

TO PROTECT ITS PROPERTY.

The effect of the Montana Supreme Court's ruling in this case constitutes more than the exercise of legitimate judicial discretion. In effect, it states to Petitioner that "You are entitled to interest, but we can't find in the record where you proved the amount of interest you are entitled to". Order Denying Petition for Rehearing, Appendix herein, infra, page 187. In fact, the amount of interest, $35,962.93, was stipulated by the parties (see page 11 , supra), and all parties recognized the validity of that stipulation until the Montana Supreme Court's Order Denying Petition for Rehearing (after which, Stensvad, for the first time and clearly acting in his own self-interest, denied the stipulation).

Admittedly, the Fourteenth Amendment is not a guarantee that a trial shall be devoid of error. Nor does it assure uniformity of judicial decision, but when the mis-

carriage is of such gravity and magnitude that it cannot be expected to happen in an enlightened system of justice, this court should intervene. Stein v. New York, 346 U.S. 156, 97 L. Ed. 1522 (1953). To deny facts which have been stipulated to by the opposing parties and which have been acknowledged without contradiction by all parties for over 10 years of litigation in the final order denying rehearing before the State Supreme Court is just such a miscarriage of justice. It cannot be tolerated.

As stated by Justice Brandeis:

> ... "the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction on this court." Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 74 L. Ed. 1107, 1113 (1939).

Nevertheless, Justice Brandeis made it quite clear that the result of a Supreme Court decision may well be a violation of the Due

Process Clause of the Fourteenth Amendment.

> "If the result above stated were attained by an exercise of the state's legislative power, the transgression of the Due Process Clause of the Fourteenth Amendment would be obvious. ... The violation is nonetheless clear when the result is accomplished by the state judiciary in the course of construing an otherwise valid ... state statute. The federal guaranty of due process extends to state action through its judicial, as well as through its legislatrive, executive, or administrative, branch of government." Ibid.

As stated by Justice Oliver Wendell Holmes speaking for This Court:

> "Whenever a wrong judgment is entered against a defendant his property is taken when it should not have been ... ." Chicago Life Insurance Co. v. Cherry, 244 U.S. 25, 61 L. Ed. 966, 969 (1917).

Justice Holmes continues to state that a mistake which is not so gross as to be impossible of rational administration of justice is no more than the imperfection of man. The clear implication is that when a mistake is so gross as to make the rational administration of justice impossible, it is a denial of constitutional rights and in particular a denial of due process of law. Ibid.

Justice Cardozo, speaking for This Court, speaks of a denial of due process when "plain rights" have been ignored.

> "To bring about a taking without due process of law by force of such a judgment, the error must be gross and obvious, coming close to the boundary of arbitrary action." Roberts v. New York, 295 U.S. 264, 79 L. Ed. 1429, 1435 (1935).

In Brinkerhoff-Faris Trust & Savings Co. v. Hill, supra, the Plaintiff Savings Company challenged the inequity in tax assessment against its shares as opposed to the assessment against other similar property. The Missouri Supreme Court denied relief claiming the Plaintiff should have exhausted administrative remedies by seeking to have its claim heard by the State Tax Commission before seeking relief in court. Previous decisions of the Missouri Supreme Court, however, made it quite clear that the State Tax Commission had no power to review such a complaint, and it was assumed by all parties and everyone involved right up until the decision of the Missouri Supreme Court

in the Brinkerhoff case that no administrative remedies existed. Further, by this time it was too late for Plaintiff to seek such relief in the State Tax Commission because of the time lapse.

Justice Brandeis, writing for This Court, stated:

> "If the judgment is permitted to stand, deprivation of Plaintiff's property is accomplished without its ever having had an opportunity to defend against the exaction. The state court refused to hear the Plaintiff's complaint and denied it relief, not because of lack of power or because of any demerit in the complaint, but because, assuming power and merit, the Plaintiff did not first seek an administrative remedy which, in fact, was never available, and which is not now open to it. Thus, by denying to it the only remedy ever available for the enforcement of its right to prevent the seizure of its property, the judgment deprives the Plaintiff of its property.
>
> ...
>
> Our present concern is solely with the question whether the Plaintiff has been accorded due process in the primary sense, - whether it has had an opportunity to present its case and be heard in its support. ... [B]ut, while it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing,

> accord the parties due process of law. Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." 74 L. E. 1112-1114.

This Court held, therefore, that the Plaintiff had been denied due process of law, and the case was reversed and remanded for further proceedings.

Similarly, in the instant case, the Petitioner Bank has not been afforded any real opportunity to protect its right to the interest that the Supreme Court has now said it was entitled to receive. Just as the Supreme Court in the Brinkerhoff case changed the rules of the game after it was too late for the Plaintiff to use the new rules to protect its property, the Montana Supreme Court in the instant case changed the rules of the game after it was too late for the Petitioner Bank to follow the fules to protect its property rights. After all parties

and all persons concerned with the case had, during over ten years of litigation, accepted a stipulation of facts (actually read into the record by opposing counsel) as establishing the amount of interest to date of sale, the Supreme Court states, for the first time in response to Petitioner's Petition for Rehearing, that such facts were not established in the record and therefore denied Petitioner's requested relief.

Just as in Brinkerhoff where the Supreme Court's reversal of position came too late for the Plaintiff to seek the newly approved relief, thereby effectively prohibiting Plaintiff from an opportunity to be heard on its claim, the Montana Supreme Court in the instant case rejected a stipulation and assumed facts too late in the litigation to enable Petitioner Bank an opportunity to be heard on the truth and validity of those facts. (Although Petitioner Bank frantically attempted to point out this inconsistency

to the Montana Supreme Court in a Petition for Correction of Remittitur, relief was again summarily denied after counsel for Stensvad - the very same person who read the stipulation into the record - responded by denying the stipulation. Denying the truth of a stipulation after petition for rehearing has been denied in a State Supreme Court clearly comes too late to afford the injured party an opportunity to prove its stipulated facts.) Just as the Plaintiff in the Brinkerhoff case was denied a real opportunity to protect its property, so was the Petitioner Bank in the instant case denied a real opportunity to protect its property, namely, its right to receive interest to the date of sale as the Montana Supreme Court indicated it was entitled to receive.

Certainly, as stated by This Court in Stein v. New York, supra, the instant case presents a miscarriage of such gravity and magnitude that it cannot be expected to happen

in an enlightened system of justice. 97 L. Ed. at 1541. Or, as stated by This Court in Roberts v. New York City, supra, the plain rights of Petitioner Bank have been ignored; the error was so gross and obvious as to come close to the boundary of arbitrary action. 79 L. Ed. at 1435. Paraphrasing Justice Holmes, the wrong done to Petitioner Bank in the instant case constitutes a mistake so gross as to be impossible in a rational administration of justice. Chicago Life Insurance Co. v. Cherry, supra, 61 L. Ed. at 969. See also American Railway Exp. Co. v. Kentucky, 273 U.S. 269, 71 L. Ed. 638, 47 S. Ct. 353 (1925) (clear conflict with those fundamental principles which have been established for the protection and enforcement of private rights); Corrigan v. Buckley, 271 U.S. 323, 70 L. Ed. 969, 46 S. Ct. 521 (1926); Wolff v. McDonnell, 418 U.S. 539, 41 L. Ed. 2d 935, 952, 94 S. Ct. 2963 (1974) (the touchstone of due process

is protection of the individual against arbitrary action of government).

(2) BY AWARDING DAMAGES FOR CONVERSION OF REAL PROPERTY CONTRARY TO THE WELL-ESTABLISHED PRINCIPLE IN ALL JURISDICTIONS THAT REAL PROPERTY IS NOT SUBJECT TO CONVERSION, THE MONTANA SUPREME COURT AGAIN IGNORED THE "PLAIN RIGHTS" OF THE APPELLANT AND DEPRIVED APPELLANT OF ITS PROPERTY WITHOUT SOME REAL OPPORTUNITY TO PROTECT IT.

Stensvad's initial complaint sought damages for conversion of real property. As stated in the second amended complaint:

II.

> That the Plaintiffs, and each of them, were the owners of certain fixed assets and certain property upon which mortgages were paid until the events as herein detailed occurred, and each business was being maintained and operated by each Plaintiff with adequate security for obligations incurred and each of the Plaintiffs had the right to the possession of all assets and business.

III.

> That the Defendant Bank has taken over such businesses, has taken over all chattels, and, without cause, converted them to its own use.
>
> IV.
>
> That as a direct and proximate cause of the actions of the Bank and unlawfully converting such property and businesses, the Plaintiffs have been damaged by the unlawful conversion [in certain fixed amounts]. Second Amended Complaint at 6.

The Trial Court held for Plaintiff Stensvad and so stated in its Findings of Fact and Conclusions of Law:

> "F. 12. The cost of construction of the improvements of the feedlots and elevators taken by the Bank from the Plaintiffs was $814,936.00. The Court finds that such sum is a fair and reasonable value for the property taken by the Bank from the Plaintiffs." Appendix herein, infra, page 73.

In affirming the lower Court's decision but reducing the amount of damages from $814,936 to $411,935, the Montana Supreme Court clearly refers to the damages as "conversion of feedlot and elevators". See Opinion, Appendix, infra, page 130. Further, the Supreme Court clearly characterizes the award as an award in the nature of conversion when it states:

"We find the District Court should have used that figure [an appraisal figure] in a determination of the proper amount to be awarded to Plaintiff for his ouster from the feedlots and elevator." Id. at 129.

It is the rule in all jurisdictions which have considered the matter that an action for conversion lies only with respect to personal property, and that real estate is not subject to conversion. Eadus v. Hunter, 268 Mich. 233, 256 N.W. 323; Glencoe Land and Gravel Co. v. Hudson Bros. Co., 138 Mo. 439, 40 S.W. 93; Shelton v. Jones, 66 Okla. 83, 167 P. 458 (1917); Carpenters' Local Union v. Texas State Federation of Labor Bldg. Assoc., 288 S.W. 2d 874 (Tx. Civ. App.); Lun v. Mahaffey, 94 Or. 292, 185 P. 746; 18 AmJur 2d 169, Conversion §20.

Although this issue was raised by Petitioner Bank at every stage in the proceedings, including in the Petition for Rehearing, it was never even acknowledged as an issue, and damages were awarded for conversion of the real estate in spite of the clear rule

of law to the contrary. If the Court determined the Petitioner Bank should not have taken over the possession of the real estate, it should simply have returned the real estate to Stensvad - because Stensvad filed a Lis Pendens on all of the real estate, the Bank was unable to sell it to third parties anyway.

It is clearly impossible in the rational administration of justice to ignore a principle of law that is uniformly recognized throughout the country and nowhere denied, even in the state of Montana. See Chicago Life Insurance Co. v. Cherry, supra, 61 L. Ed. at 969. As stated by This Court in Roberts v. New York, supra, 79 L. Ed. at 1435, due process is lacking where "plain rights" have been ignored. The error certainly is so gross and obvious as to come close to the boundary of arbitrary action. Ibid. By the mere fact that the Supreme Court of Montana as well as the Trial Court failed to deal with this issue in spite of

the fact that all law on the subject supports Petitioner, due process was denied. Petitioner was denied an opportunity to protect its property. Brinkerhoff-Faris Trust & Savings Co. v. Hill, supra, 74 L. Ed. 2d at 1114. An opportunity to be heard in a court of law is meaningless when entitlement to property is clearly outlined and supported by law which is universally accepted with no exceptions and that property is nevertheless taken without comment on this rule of law. Petitioner, therefore, has been effectively denied an opportunity to protect its property. Brinkerhoff, supra.

(3) BY RULING THAT RESPONDENT STENSVAD WAS ENTITLED TO DAMAGES FOR VALUE OF CERTAIN REAL AND PERSONAL PROPERTY CONTRARY TO PREVIOUS RULINGS OF THE SAME TRIAL COURT INVOLVING THE SAME PARTIES AND THE SAME PROPERTY WHEN THE DOCTRINE OF RES JUDICATA WAS PROMINENTLY AND PROPERLY RAISED CONSTITUTES A DENIAL OF

PETITIONER'S PROPERTY WITHOUT DUE PROCESS OF LAW.

When the Bank foreclosed on the collateral securing its promissory notes, it used legal means to do so. All real estate was foreclosed under proper judicial proceedings in a separate lawsuit including the issue of a judgment and decree of foreclosure by the exact same trial court that heard the instant case. See Judgment and Decree of Foreclosure in Cause No. 7072, Appendix, infra, page 1 . Although not required to do so under the Uniform Commercial Code, the Bank used legal proceedings to foreclose and sell all personal property also. See Order Approving Sale and Judgment in Cause No. 7054, Appendix, infra, page 14. The Order shows on its face that opposing counsel (for Stensvad) appeared. Id. at 14 . The judgments in these separate lawsuits rendered a monetary judgment in favor of Petitioner on the promissory notes after application of

proceeds from sale and after reduction kby costs of sale and other appropriate costs but increased for amount of interest. The judgments were not appealed.

Despite continual insistence by Petitioner that any offset should use the judgment amounts from these separate lawsuits as the starting point, the Trial Court, and later the Supreme Court, picked an arbitrary date (November 11, 1971) and applied all sale proceeds and interest calculations from that date in determining the amount awarded Petitioner on its promissory notes.

> 27. For convenience in analyzing the evidence, the Court adopts November 11, 1971 as an accounting date for the setoff because the Bank commenced a compilation of adequate accounting records on that date. As of November 11, 1971, the Plaintiffs were indebted to the Bank for all borrowings in the amount of $1,022,325.71. Findings & Conclusions, March 24, 1980, Appendix, infra, page 77.

The original Supreme Court opinion adopted the same date without comment. Opinion, Appendix, infra, page 101.

Although the doctrine of res judicata

is well-known in every jurisdiction and was prominently and properly raised at every point of this lawsuit by Petitioner, neither the Trial Court nor the Supreme Court ever referred to this doctrine nor attempted to explain why it should not apply. The rule is well-summarized by the editors of AmJur 2nd:

> "As stated in many cases, the doctrine of res judicata is that an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of causes of action and of facts or issues thereby litigated, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction." 46 AmJur 2d 558-59, Judgments §394. Accord 1B Moore, Fed. Prac. ¶0.405.

This doctrine is well-recognized in Montana. Section 26-3-201, M.C.A.; S-W Co. v. John Wight, Inc., 587 P.2d 348 (Mont. 1978); Smith v. Musselshell County, 155 Mont. 376, 378, 472 P.2d, 878, 880 (1970); Brannon v. Lewis & Clark County, 387 P.2d 706 (Mont. 1963). These cases all indicate criteria that must be met in order for the principle of res

judicata to apply. Throughout, Petitioner has maintained that all criteria are met in the instant case and at no time has either the Trial Court or the Supreme Court ever suggested to the contrary. As previously stated, the judgments in the prior cases have not been appealed, and the time for appeal has expired. They have not been collaterally attacked in the instant case or in any other case. The criteria for the application of the principle of res judicata all apply. Yet, the principle of res judicata was not applied in the instant case. In this connection, this issue is very closely related to the interest issue inasmuch as the principal difference in the outcome by applying res judicata is the amount of interest between November 11, 1971 and the date of application of sale proceeds (essentially the date of judgment in the prior cases).

Again, as previously stated, it is impos-

sible in the rational administration of justice to ignore a principle of law that is so well-recognized and uniformly recognized throughout the United States and particularly in the state of Montana as the principle of res judicata. See Chicago Life Insurance Co. v. Cherry, supra, 61 L. Ed. at 969. As stated by This Court in Roberts v. New York, supra, 79 L. Ed. at 1435, due process is lacking where "plain rights" have been ignored. The error is certainly so gross and obvious as to come clos to the boundary of arbitrary action. Ibid. By the mere fact that the Supreme Court of Montana as well as the Trial Court failed to deal with this issue in spite of the fact that it was timely and properly raised by Petitioner Bank and in spite of the fact that the decision reached could not have been reached without considering this argument, Petitioner's property has been taken without a full opportunity to protect it. Brinkerhoff-Faris

Trust & Savings Co. v. Hill, supra, 74 L. Ed. 2d at 1114. An opportunity to be heard in a court of law is meaningless when entitlement to property is clearly outlined and supported by law which is universally accepted with no exceptions and that property is nevertheless taken without comment on this rule of law. Petitioner Bank, therefore, has been effectively denied an opportunity to protect its property. Brinkerhoff, supra.

B.

THE FEDERAL QUESTIONS WERE TIMELY RAISED.

Obviously, the federal question regarding the interest issue was not raised until the decision of the Montana Supreme Court denying Petitioner's Petition for Rehearing. Up until that time, all parties, including Respondent Stensvad, had all operated under the impression that the amount of interest was fixed by stipulation at $35,963.00. Only when the Supreme Court unexpectedly and without warning suggested that they could

not determine the amount of the interest (even though it had been stipulated to by the parties) was the issue raised. In denying Petitioner's Petition for Rehearing, the Montana Supreme Court states:

> "1. Petitioner Bank contended it is entitled to a setoff for interest accrued on the principal indebtedness on the notes from the date of breach until the moneys received on foreclosures by the Bank were applied on the notes. We so indicated in our Opinion. However, we carefully searched the record to determine the applicable amounts and dates, and were unable to identify either in any case. This Court is bound by the record before us. Therefore, we held that the setoff would be the amount of principal indebtedness as of the date of the breach on facts found by the District Court. See Appendix, infra, pages 187-188.

As previously indicated, had the Montana Supreme Court simply found the stipulation entered in the record by opposing counsel, it could not have stated that their search of the record was fruitless. The issue of denial of due process by failure to recognize this stipulation or, in the alternative, the failure to give Petitioner an opportunity

to be heard to establish the validity of the facts contained in the stipulation was not an issue until the Supreme Court made its astounding statement. Therefore, the issue was timely raised.

As stated by This Court in Saunders v. Shaw, 244 U.S. 317, 61 L. Ed. 1163, 37 S. Ct. 638 (1917) (Holmes, J.):

> "... when the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding, when the Plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here. The Defendant was not bound to contemplate a decision of the case before his evidence was heard, and therefore was not bound to ask a ruling or to take other precautions in advance. The denial of rights given by the 14th Amendment need not be by legislation."
> 61 L. Ed. at 1165-66.

Accord Brinkerhoff-Faris Trust & Savings Co. v. Hill, supra, 74 L. Ed. at 1112; Herndon v. Georgia, 295 U.S. 441, 79 L. Ed. 1530, 55 S. Ct. 794; Mo. ex rel. Missouri Ins. Co. v. Gehner, 281 U.S. 313, 74 L. Ed. 870, 50

S. Ct. 326 (1930); Great Northern R.R. Co. v. Sunburst Oil & Ref. Co., 287 U.S. 358, 77 L. Ed. 360, 367-68, 53 S. Ct. 145 (1932).

Thus, there is a well-recognized exception to the general rule that a constitutional question is urged too late if put forward on a Petition for Rehearing.

> The rule, generally as it is, does not extend to cases ... where the grounds of the decision supply a new and unexpected basis for a claim by the defeated party of the denial of a federal right. Great Northern R.R. Co. v. Sunburst Oil & Ref. Co., supra, 77 L. Ed. at 367-68.

Since the federal issue was raised at Petitioner's first opportunity, it was timely raised.

The application of this first opportunity rule is certainly appropriate to the interest portion of the federal question raised in this petition. Obviously, it could not have been anticipated or raised at an earlier point than it was. Also, since the res judicata issue is so intricately a part of the interest issue, it is difficult, if not im-

possible, to say that it too could have been anticipated. Who would have thought that the State Supreme Court would ignore such a prominent and well-recognized principle as this. The failure of the Montana Supreme Court to recognize and deal with the issue and yet still rule against Petitioner on this issue could certainly not have been anticipated. Finally, the conversion of real estate issue similarly could not have been anticipated. The decision of the Montana Supreme Court in failing to deal with this latter issue and yet ruling against Petitioner on this point simply could not have been anticipated. In any event, both of these latter two issues, namely, the res judicata issue and the conversion of real estate issue, were properly raised as a federal issue (denial of due process under the 5th and 14th Amendments) during the rehearing process. And, as previously stated, they are intricately related to the interest

issue which did not arise until after the Court's denial of the Petition for Rehearing.

C.

THERE EXISTS SUFFICIENT SPECIAL AND IMPORTANT REASONS FOR GRANTING THE WRIT, WHICH ARE REAL AND SUBSTANTIAL FEDERAL QUESTIONS.

To sustain review, "special and important reasons" must be present. S. Ct. Rule 17. These reasons must not be "academic" or "abstract". Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 99 L. Ed. 897, 75 S. Ct. 614. The settlement of the principles involved must be important to the public. Rice, supra. The federal question must be real, Equitable Life Assur. Soc. v. Brown, 187 U.S. 308, 47 L. Ed. 190, 23 S. Ct. 123, and substantial. Palmer Oil Corp. v. Amerada Petroleum Corp., 343 U.S. 390, 96 L. Ed. 1022, 72 S. Ct. 842.

The kinds of considerations listed in Court Rule 17 are "neither controlling nor

fully measuring" of this court's discretion, Rule 17.1, and are illustrative but not exhaustive. Rice, supra.

One factor that can be considered in determining whether special or important reasons are present is the amount of money that is at stake, even though that factor is not sufficient in itself. United States v. Constantine (1935) 296 U.S. 287, 80 L. Ed. 233, 56 S. Ct. 223 (a question is an important one under predecessor to Rule 17, where, among other considerations, a large amount of money is involved. $1,000 special excise tax was involved in that case).

There can be no question that the amount of money involved here is large. If Petitioner is successful or unsuccessful, the stake involved is as follows:

-- interest question	$ 35,963
-- conversion of realty question	411,935
-- additional amounts under res judicata question	631,213
Total	$1,079,111

The matter has an obvious substantial impact on the Petitioner, a bank, its stockholders, and the people in the community if Respondent were to execute on a judgment against the Bank and its deposits.

More importantly, of course, is the importance of the legal issue. When errors of this magnitude creep into the law, it affects the entire administration of justice. It is clearly impossible in the rational administration of justice to ignore the principle of res judicata, the principle that real estate is not subject to conversion, and to ignore stipulated facts in the record (or, to allow the opposing party to repudiate a stipulation after the denial of a Petition for Rehearing in the state's highest court - which has the same effect). To effectively deny Petitioner an opportunity to be heard on these matters will signal to state courts throughout the land that they need not be concerned about appeals or petitions for

certiorari to the United States Supreme Court unless a direct interpretation of a federal statute or federal constitutional provision is involved. It is respectfully submitted that the rational administration of justice in this country requires that this issue be addresses in order to prevent a reoccurrence of this kind of gross error in violation of the "plain rights" of the parties.

D.

THE MONTANA SUPREME COURT DECISION DOES NOT PROVIDE AN ADEQUATE OR SUBSTANTIAL INDEPENDENT GROUND FOR ITS DECISION.

It is submitted that the decision of the Montana Supreme Court was so insubstantial and insufficient as to constitute a denial of due process in the taking of the Bank's property via the judgment. With reference to each of the three issues, it is argued as follows:

(1) Allowable Interest.

As noted, the Court of original

jurisdiction awarded Petitioner interest; the Montana Supreme Court agreed that interest was due from the time of the claimed breach of an agreement to finance until the application of foreclosure moneys to the balance due.

The stipulation of counsel for both sides in evidence in the case is that that amount was $35,962.93.

Neither the Respondent nor the Court at any point prior to judgment suggested, argued or pleaded, or even appeared on the question of the amount being in controversy. As offered by Respondent's counsel, the stipulation agreed to was as follows:

> "Let the record further reflect that had interest been accrued in these obligations, the interest to June 10, 1972, would be $35,962.93 accrued interest."
>
> Jan. 22, 1979, Supplemental Hearing Before the Court of Original Jurisdiction.

There is no basis in the record for concluding otherwise, and the decision of the Montana Supreme Court denying interest to Petitioner cannot be supported on any other

grounds.

(2) Conversion of Real Estate.

As noted, the Montana Supreme Court affirmed damages in the amount of $411,935 without acknowledgment of Petitioner's argument that realty is not subject to conversion nor are damages therefore available. The Court simply fully avoided the issue. The Court could not have reached the same conclusion by invoking any other principle of law. Further, as previously shown, its decision was clearly not based on any other principle. Acknowledging the issue would mean a return of the real property to Stensvad, and this was not done.

(3) Res Judicata.

The Supreme Court of Montana similarly avoided the issue of res judicata and affirmed an award of $631,213 (over and above the conversion of real estate amount of $411,935). While Petitioner did receive credit for $1,022,325.00, that figure would

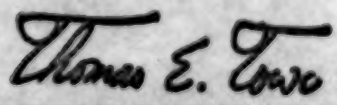
certainly have been much different had the principle of res judicata been applied and the offset commenced computation from the judgment amounts of the previous cases.

Again, there is no way the Montana Supreme Court could have reached the decision they reached in the amounts they awarded to Petitioner as an offset on some independant grounds. There is absolutely no way they could have arrived at the above figures without ignoring res judicata, and thus, the decision does not provide an adequate or substantial independent grounds for its decision.

9. CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



THOMAS E. TOWE
Counsel for Petitioner
2525 Sixth Avenue North
Billings, Montana 59101

CERTIFICATE OF SERVICE

I, THOMAS E. TOWE, attorney for Miners & Merchants Bank, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on May 26, 1982, I served three (3) copies of the foregoing Petition for a Writ of Certiorari on the Respondent herein, by mailing the copies in a duly addressed envelope, with first class postage prepaid, to Ken Tolliver, Esq., Attorney of record for Respondent, at Post Office Box 1977, Billings, Montana, 59103.

Thomas E. Towe

THOMAS E. TOWE, ESQ.
2525 Sixth Avenue North
Billings, Montana 59101

81-2200

No._____

Office - Supreme Court, U.S.
FILED
MAY 26 1982
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

THE MINERS AND MERCHANTS BANK
OF ROUNDUP, MONTANA,

Petitioner,

vs.

L. D. STENSVAD, personally and as representative of the investing shareholders of AGRI-SERVICES, INC., M-V ENTERPRISES, INC., M&S CATTLE FEEDERS, and L. D. STENSVAD CATTLE CO., all Montana corporations,

Respondent.

ON WRIT OF CERTIORARI FROM
THE SUPREME COURT OF THE STATE OF MONTANA

APPENDIX WITH A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Thomas E. Towe, Esq.
Counsel for Petitioner
2525 Sixth Avenue North
Billings, Montana 59101
(406) 248-7337

IN THE DISTRICT COURT OF THE FOURTEENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF MUSSELSHELL

THE MONTANA NATIONAL BANK OF ROUNDUP, MONTANA, Plaintiff, vs. M-V ENTERPRISES, INC., Defendant.	Filed 5/5/72 Case No. 7072 JUDGMENT AND DECREE OF FORECLOSURE

The above-entitled cause came on regularly to be heard on this 5th day of May, 1972, before the Court, sitting without a jury, Plaintiff appearing with its counsel, Thomas E. Towe, Attorney at Law, Billings, Montana, and the Defendant not appearing either in person or by counsel.

It appearing that the Defendant M-V ENTERPRISES, INC. has heretofore been duly served with Summons and Complaint and that the time for Defendant to answer or otherwise plead has heretofore expired and that the Default of the Defendant has been duly

entered.

It further appearing by Affidavit and by testimony to the satisfaction of the Court in support of the allegations in the Plaintiff's Complaint that:

I.

That the Montana National Bank of Roundup, Montana, was formerly known as and is the successor to The Miners and Merchants Bank of Roundup, Montana, and at all times pertinent hereto was regularly engaged in the banking business in the State of Montana.

II.

That the promissory notes set forth as Exhibits "A", "C", "D", and "E" to the Complaint were duly and properly executed by Defendant for good and valuable consideration according to the tenure and upon the terms and upon the dates set forth on the face of each said promissory note.

III.

That the following amounts are due and

owing on each of said notes, together with interest computed to May 5, 1972, and attorney's fees:

Note	Principal	Interest	Attorney's Fees
Exhibit "A"	$ 37,000.00	$ 628.97	$1,652.58
Exhibit "C"	17,000.00	264.90	1,245.30
Exhibit "D"	80,000.00	1,246.61	2,524.93
Exhibit "E"	149,333.32	6,064.32	4,007.95

TOTALS:	Exhibit "A" -	$ 39,281.55
	Exhibit "C" -	18,510.20
	Exhibit "D" -	83,771.54
	Exhibit "E" -	159,405.59
TOTAL		$300,968.88

IV.

That Exhibit "E" calls for payments of $2,666.67, plus interest upon the 15th day of each month; that the note set forth in Exhibit "E" further provides that in the event of default the outstanding unpaid balance, plus accrued interest, shall immediately become due and payable at the option of the holder; that said note became due and the holder exercised its option by proper notice to Defendant accordingly and that

the entire amount is now due and payable; that the entire amount of principal and interest and attorney's fees as set forth above is also now due and payable on the promissory notes set forth as Exhibits "A", "D", and "C".

V.

That as security for the above notes the Defendant pledged certain real estate, which pledge is represented in the mortgage set forth as Exhibit "B" attached to the Complaint; that said real estate is more particularly described hereinafter and said mortgage covering said real estate was filed for record on the 22nd day of July, 1971, in Book 238 of Mortgages at Page 528; that Defendant was at the time of said mortgage and is now the owner of said real estate and that the aforesaid mortgage is a valid lien against the lands described therein and that all of the sums aforesaid, plus costs of suit herein, are valid liens and first liens upon the aforesaid property;

that the terms of the aforesaid mortgage have been broken and Defendant is in default therein for failure to comply with the terms of the promissory notes hereinbefore set forth;

VI.

And Plaintiff is entitled to a Judgment against the Defendant for the sums of money set forth hereinabove and to a Judgment decreeing foreclosure of the mortgage securing the indebtedness aforesaid, together with an Order of Sale ordering the Sheriff of Musselshell County, Montana, to conduct a foreclosure sale of the real property described in the attached Mortgage, which is hereby incorporated by reference, in accordance with the statutes therein made and provided and the usual proceedings of this Court and the proceeds of said sale applied to the payment of the amount found to be due as aforesaid.

VII.

The Defendant is not in possession of the property or any portion thereof and is not entitled to rights of possession during the period, if any, of redemption.

It further appearing to the Court that each and all of the allegations contained in the Plaintiff's Complaint are true and correct and the Court having heard all of the evidence and the proofs adduced and having considered the same and having been fully advised in the premises, and good cause appearing,

NOW, THEREFORE, upon motion of Thomas E. Towe, attorney for the plaintiff,

IT IS ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover from the Defendant M-V ENTERPRISES, INC., Judgment as follows:

The sum of $300,968.88, together with costs of suit and any and all costs and charges of sale, plus interest on all such sums remaining unpaid from date of this Judg-

ment at the rate of 6% per annum until paid;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiff foreclose its mortgage securing the aforesaid amounts, and that the said real property be sold at public auction according to law, and that the Plaintiff or any party to this suit, or any other third party, may purchase at said sale;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the said sale be made at public auction for cash by the Sheriff of Musselshell County, Montana, and that out of the proceeds of said sale said sheriff shall retain his fees, disbursements and commission on said sale, and pay to Plaintiff or its attorney out of the proceeds of said sale

The sum of $300,968.88 with interest thereon at the whole of said sum from this date forward at the rate of 6% per annum until paid, as found by this Court to be due and owing upon the debts secured by the

mortgage hereby foreclosed, or so much thereof as said sale proceeds permit;

That said Sheriff take and return to this Court receipts for the amount so paid to be presented to this Court, together with his return and report of sale, and any surplus monies which may remain after applying the proceeds of said sale as aforesaid, within ten days after making said sale, said surplus, if any there be, to abide further order of this Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Defendant M-V ENTERPRISES, INC., a Montana corporation, together with all persons claiming from or under them, be, and they hereby are, forever barred and foreclosed of and from all equity of redemption and claim in or to said mortgage property and all parts thereof, except such rights of redemption as they may have by law from said sale;

IT IS FURTHER ORDERED, ADJUDGED AND

DECREED that if the proceeds of said sale and from the sale of all other property pledged for the payment of the promissory Notes set forth herein are insufficient to pay the amount so found to be due to the Plaintiff as set forth above, with interest, costs, attorney's fees, and expenses of sale, the said Sheriff shall so specify and set forth in his return of sale the amount of the deficiency and the amount remaining due to the Plaintiff, whereupon on the coming in of said return, Judgment of this Court shall be docketed for the amount of said balance or deficiency against the Defendant, M-V ENTERPRISES, INC., and all other persons who are or may be liable for the payment of the debt secured by said mortgage, with interest upon the amount of said deficiency at the rate of 6% per annum from the date of said return and report of said sale until paid; and that the Plaintiff have execution for said amount; that it is specifically

recognized by the Court herein that Judgment is being sought in a companion case or cases against guarantors who are or may be determined to be personally liable for the sums hereinbefore set forth and that this Judgment and Decree shall have no affect whatsoever on the determination of whether or not said alleged guarantors are or are not liable except to the extent of establishing the amount of such liability.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the premises above referred to are described as follows, to-wit:

Section 8, Township 8 North, Range 26 East, M.P.M. S-1/2S-1/2. Containing 140 acres more or less. Excepting therefrom the following described tracts:

Tract I. Beginning at the corner common of Sections 7, 8, 17, and 18, Township 8 North, Range 26 East, and running thence North along the boundary line between said Sections 7 and 8, a distance of 30 feet;

thence east on a line parallel with the boundary line between said Sections 8 and 17, a distance of 30 feet to the point of beginning of the tract herein excepted running thence north parallel with the boundary line between said Sections 7 and 8, a distance of 800 feet; thence east parallel with the boundary line between said Sections 8 and 17, a distance of 337.6 feet; thence south parallel with the west line of the tract herein described a distance of 800 feet; thence west parallel with the boundary line between said Sections 8 and 17, a distance of 337.6 feet to the point of beginning.

Tract II. A tract of land in the S-1/2SW-1/4 of Section 8, Township 8 North, Range 26 East M.P.M. described as shown on that certain Warranty Deed dated June 20, 1967, and filed June 26, 1967, and recorded in Book 226, page 194 of the records of the County Clerk and Recorder, Musselshell County, Montana.

Beginning at the section corner common to Sections 5, 6, 7, and 8, Township 8 North, Range 26 East, M.P.M., thence south 0° 54' West, 5250.2 feet thence South 89° 51' East, 367.6 feet to the point of beginning of the tract to be described; thence from said last point North 0° 54' East 460.0 feet thence South 89° 51' East, 951.8 feet; thence South 0° 54' West 460.0 feet; thence North 89° 51' West 951.8 feet, more or less, to the point of beginning (containing 10.05 acres more or less).

Tract III. A tract of land in the S-1/4SW-1/4 of Section 8, Township 8 North, Range 26 East, M.P.M. described as shown in that certain Warranty Deed dated June 20, 1967, and filed June 26, 1967, and recorded in Book 226, page 194 of the records of the County Clerk and Recorder, Musselshell County, Montana,

Beginning at the section corner common to Sections 5, 6, 7, & 8, Township 8 North,

Range 26 East, M.P.M. thence South 14° 33' East 495].9 feet to a point; thence South 77° 41' East 1150.0 feet to the point of beginning of the tract to be described; thence from said last point South 77° 41' East 150.0 feet; thence South 12° 19' West 100.0 feet; thence North 77° 41' West 150.0 feet; thence North 12° 19' East 100.0 feet, to the point of beginning. (containing .344 acres more or less).

TOGETHER WITH the right of ingress and egress to such parcel from U.S. Highway 12, subject to easements, reservations, and rights of way of record, together with all and singular the tenements, hereditaments, appurtenances, easements, water and all of her rights belonging or in anywise appertaining thereto, unto the mortgagee, its successors and assigns.

DONE, MADE AND ENTERED this 5th day of May, 1972.

/s/ NAT ALLEN
JUDGE OF THE DISTRICT COURT

IN THE DISTRICT COURT OF THE FOURTEENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF MUSSELSHELL

THE MINERS AND MERCHANTS BANK OF ROUNDUP, MONTANA, Plaintiff and Petitioner, -vs- AGRI-SERVICES, INC., L.D. STENSVAD, M & S CATTLE FEEDERS, M-V ENTERPRISES, INC. AND L.D. STENSVAD CATTLE CO., Defendants and Respondents.	Filed 4/14/72 No. 7054 ORDER

A Motion for Sale of Securities having been made by Plaintiff and, after having been continued and re-set from time to time, the matter came regularly for hearing before this court on the 24th day of March, 1972, with both parties appearing through counsel, and good cause appearing,

NOW, THEREFORE, IT IS HEREBY ORDERED, that no Order or permission from this Court

is required or necessary to authorize a sale pursuant to the Uniform Commercial Code by Plaintiff of the collateral obtained by Plaintiff through the Claim and Delivery Proceeding in this action. Such sale may proceed subject to the terms of the Uniform Commercial Code and subject to Defendants' remedy for costs and damages under the terms of the Undertaking on file herein.

DATED this 11th day of April, 1972.

/s/ NAT ALLEN
DISTRICT JUDGE

IN THE DISTRICT COURT OF THE FOURTEENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF MUSSELSHELL

THE MINERS AND MERCHANTS BANK OF ROUNDUP, MONTANA,

Plaintiff,

vs.

AGRI-SERVICES, INC., L.D. STENSVAD, M & S CATTLE FEEDERS, M-V ENTERPRISES, INC., AND L. D. STENSVAD CATTLE CO.,

Defendants.

Filed 1/17/74

No. 7054

JUDGMENT

On September 11, 1973, this Court duly made and filed its Order herein granting Summary Judgment in favor or Plaintiff and against Defendants and each of them on all issues.

Now, therefore, upon Motion of Counsel for Plaintiff and in accordance and pursuant to said Order of September 11, 1973;

IT IS ORDERED, ADJUDGED AND DECREED that Summary Judgment be, and it hereby is,

entered in favor of the Plaintiff and against Defendants and each of them on all issues, and that Plaintiff have and recover from Defendants and each of them the sum of $137,033.86 plus $20,555.00 as attorney fees and other Court costs taxed in the amount of $_____, and interest on said sums from 21 December, 1973 at the rate of 6% per annum.

Done and Dated this 10th day of January, 1974.

/s/ Nat Allen
DISTRICT JUDGE

IN THE DISTRICT COURT OF THE FOURTEENTH JUDICIAL DISTRICT FOR THE STATE OF MONTANA IN AND FOR THE COUNTY OF MUSSELSHELL

Filed 5/24/73

AGRI-SERVICES, INC., M-V ENTERPRISES, INC., M & S CATTLE FEEDERS, and L. D. STENSVAD CATTLE CO., all Montana corporations, Plaintiffs, -vs- THE MINERS AND MERCHANTS BANK OF ROUNDUP, MONTANA, Defendant.	Case No. 7052 REQUEST FOR ADMISSIONS OF FACT AND GENUINENESS OF DOCUMENTS

TO: L. D. STENSVAD CATTLE CO. and CHARLES F. MOSES, Sandall, Moses & Cavan, P. O. Box 1297, Billings, Montana, Attorneys for Plaintiff, L. D. Stensvad Cattle Co.

The Defendant, MINERS AND MERCHANTS BANK OF ROUNDUP, MONTANA, requests the Plaintiffs herein, within twenty (20) days after service of this request to admit, for the

purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at trial, the following:

I.

That each of the following documents exhibited with this request are genuine:

1. The Promissory Notes dated August 30, 1971, August 3, 1971, August 30, 1971, September 13, 1971, September 21, 1971, October 4, 1971, October 13, 1971, October 13, 1971, October 15, 1971, October 18, 1971, October 19, 1971, October 21, 1971, October 26, 1971, October 27, 1971, November 1, 1971, November 1, 1971, November 5, 1971, November 5, 1971, November 11, 1971, and November 16, 1971, respectively, signed by L. D. Stensvad Cattle Co., Inc., copies of which are hereto attached as Exhibit "A", pages 1 through 7.

2. Promissory Note and Guaranty dated April 1, 1969, signed by Agri-Services, Inc.,

a copy of which is attached hereto as Exhibit "B", pages 1 through 4.

3. A Promissory Note dated July 16, 1971, signed by Agri-Services, Inc., a copy of which is attached hereto as Exhibit "C".

4. The Promissory Notes dated August 18, 1971, October 27, 1971, and November 1, 1971, respectively, signed by Agri-Services, Inc., copies of which are attached hereto as Exhibit "D".

5. Promissory notes dated July 16, 1971 and September 20, 1971, signed by M & S Cattle Feeders, Inc., copies of which are attached hereto as Exhibits "E" and "F", respectively.

6. Promissory notes dated July 16, 1971, September 22, 1971, October 4, 1971, and November 11, 1971, signed by M-V Enterprises, Inc., copies of which are attached hereto as Exhibits "G", "H", "I" and "J", respectively.

7. Security Agreements dated July 13,

1971, September 20, 1971, and September 30, 1971, executed by L. D. Stensvad Cattle Company, copies of which are annexed hereto as Exhibit "K", pages 1 through 5; Exhibit "L" and Exhibit "M", pages 1 through 2, respectively.

8. A Security Agreement dated July 20, 1971, executed by Agri-Services, Inc., a copy of which is annexed hereto as Exhibit "N", pages 1 through 6.

9. Security Agreements dated January 5, 1971 and September 20, 1971, executed by M & S Cattle Feeders, Inc., copies of which are annexed hereto as Exhibit "O", pages 1 through 4, and Exhibit "P", respectively.

10. A Security Agreement dated July 16, 1971, executed by M-V Enterprises, Inc., a copy of which is annexed hereto as Exhibit "Q", pages 1 through 3.

11. Guaranties all executed on October 12, 1971, by L. D. Stensvad Cattle Company, Agri-Services, Inc., M & S Cattle

Feeders, Inc. and M-V Enterprises, Inc., copies of which are annexed hereto as Exhibits "R", "S", "T", and "U".

12. An Assignment of Interest in Contract for Deed executed September 20, 1971, by M & S Cattle Feeders, Inc., a copy of which is annexed hereto as Exhibit "V", pages 1 and 2.

13. A General Assignment of Accounts Receivable executed on July 29, 1971, by L. D. Stensvad Cattle Co., a copy of which is annexed hereto as Exhibit "W", pages 1 through 4.

14. General Assignments of Accounts Receivable, each signed July 16, 1971, executed by L. D. Stensvad Cattle Co., Agri-Services, Inc., M & S Cattle Feeders, and M-V Enterprises, copies of which are annexed hereto as Exhibits "X", "Y", "Z" and "AA", respectively.

15. An Assignment to Defendant Bank of all contracts and Special Cattle Feeding

Loan Agreements between Central Montana Production Credit Association and other persons executed on September 17, 1971, by L. D, Stensvad Cattle Company and attached hereto as Exhibit "BB", pages 1 through 4.

16. A letter from L. D. Stensvad to Miners & Merchants Bank of Roundup, Montana, dated September 16, 1971, a copy of which is attached hereto as Exhibit "CC", pages 1 through 3.

17. A letter from L. D. Stensvad to Wilbur Townsend of Miners and Merchants Bank dated September 21, 1971, a copy of which is attached hereto as Exhibit "DD", pages 1 through 3.

18. A letter from Attorney Floyd A. Brower to the officers of Defendant Bank dated October 11, 1971, a copy of which is attached hereto as Exhibit "EE", pages 1 through 2.

19. A letter from Attorney Floyd A. Brower to the officers of Defendant Bank

dated November 9, 1971, a copy of which is attached hereto as Exhibit "FF".

20. The Notice of Private Sale addressed to L. D. Stensvad Cattle Company, M-V Enterprises, M & S Cattle Feeders and Agri-Services, Inc., dated November 16, 1971, from Defendant Bank, a copy of which is attached hereto as Exhibit "GG".

21. The Notice of Private Sale addressed to M-V Enterprises, Inc. dated November 30, 1971, from Defendant Bank, a copy of which is annexed hereto as Exhibit "HH", pages 1 through 3.

22. A Notice of Sale to L. D. Stensvad, Otto Stensvad, Marguerite Stensvad, Paul Hildebrand, M-V Enterprises, Inc., M & S Cattle Feeders, Inc. and Agri-Services, Inc. dated May 30, 1972, from Defendant Bank, a copy of which is annexed hereto as Exhibit "II", pages 1 through 8.

23. A notice of possession of the M & S

Cattle Feeders feed lot and entire operation from Defendant Bank, a copy of which is annexed hereto as Exhibit "JJ", said letter and notice being sent to L. D. Stensvad, d/b/a M & S Cattle Feeders, Inc.

II.

That each of the following facts are true:

1. That the notes set forth as Exhibit "A", pages 1 through 7 in Paragraph I, No. 1, were due and owing on the dates and in the amounts set forth on each note or payment schedule of each note and were not paid at the time the Defendant Bank took possession of the assets of the said Plaintiff corporations.

2. That the note set forth in Paragraph I, No. 2, as Exhibit "B", pages 1 through 5 was due and owing on November 1, 1971, and was due and owing and not paid at the time the Defendant Bank took possession of the assets of the said Plaintiff corporations,

in the amount of $50,119.71.

3. That the note set forth in Paragraph I, No. 3, as Exhibit "C" was due and owing on the dates and in the amounts set forth on the note or payment schedule of said note and was not paid at the time the Defendant Bank took possession of the assets of the said Plaintiff corporations.

4. That the notes set forth in Paragraph I, No. 4, as Exhibit "D" were due and owing on the dates and in the amounts set forth on each note or payment schedule and were not paid at the time the Defendant Bank took possession of the assets of the Plaintiff corporations.

5. That the amount of $77,000.00 was due and owing on the note set forth in Paragraph I, No. 5, Exhibit "E" and was not paid at the time the Defendant Bank took possession of the assets dof the said Plaintiff corporations.

6. That the note set forth in Paragraph

I, No. 5, as Exhibit "F" was due and owing on October 30, 1971 and was not paid at the time the Defendant Bank took possession of the assets of the Plaintiff corporations, in the amount of $60,000.00.

7. That the notes set forth in Exhibits "G", "H", "I", and "J" in Paragraph I, No. 6, were due and owing on the dates and in the amounts set forth on each note or payment schedule of each note and were not paid at the time the Defendant Bank took possession of the assets of the said Plaintiff corporations.

8. That the letter set forth as Exhibit "CC", pages 1 through 3 was sent or delivered to Defendant Bank by L. D. Stensvad, President of Plaintiff corporations, on or about September 16, 1971.

9. That the letter set forth as Exhibit "DD", pages 1 through 3 was sent or delivered to Defendant Bank by L. D. Stensvad, President of Plaintiff corporations, on or about Sep-

tember 21, 1971.

10. That the letter set forth as Exhibit "EE", pages 1 through 2 was sent or delivered to the Defendant Bank by Floyd A. Brower, attorney for Plaintiff corporations on October 11, 1971, at the request and direction of L. D. Stensvad, President of the Plaintiff corporations.

11. That the letter set forth as Exhibit "FF" was sent or delivered to the Defendant Bank by Floyd A. Brower, attorney for Plaintiff corporations on November 9, 1971, at the request and direction of L. D. Stensvad, President of the Plaintiff corporations.

12. That the Notice of Private Sale from Defendant Bank, as set forth as Exhibit "GG" was received by L. D. Stensvad, President of Plaintiff corporations shortly after November 16, 1971.

13. That a Notice of Private Sale as set forth herein as Exhibit "HH", pages 1 through 3, was received by L. D. Stensvad,

President of Plaintiff M-V Enterprises, Inc. on or about the 1st day of December, 1971.

14. That a Notice of Sale as set forth herein as Exhibit "II", pages 1 through 8, was received by L. D. Stensvad, President of Plaintiff corporations, on or about the 31st day of May, 1972.

15. That a notice of taking possession of the M & S Cattle Feeders feed lot and entire operation sent by Defendant Bank, as set forth as Exhibit "JJ", was received by L. D. Stensvad, President of M & S Cattle Feeders, Inc. on or about the 19th day of November, 1971.

16. That the Linestand by Defendant Bank per Stensvad Companies attached hereto as Exhibit "KK" orrectly reflects the balances due on each of the notes involved in the entire transaction on November 11, 1971, showing a total outstanding balance of $1,022,325.73.

17. That no cattle were transferred and no property was repossessed by the Defendant Bank in connection with any of the Stensvad corporations' loans until after the 19th day of November, 1971, as set forth in Exhibit "MM" attached hereto.

18. That Defendant Bank advertised the sale held on June 10, 1972, by sending copies of the sale books, a copy of which is attached hereto as Exhibit "QQ", to all of the feedlots listed in the "1972 National Cattle Feedlot, Meat Packer & Grain Dealers Directory", published by Tara Publishing Company, Inc., 2315 50th Street, Suite 1, Lubbock, Texas, in the following states:

Iowa, Minnesota, Missouri, Nebraska, North Dakota, South Dakota, Colorado, Kansas, Oklahoma, Texas, Arizona, California, Idaho, Montana, Nevada, Oregon, Utah, Washington, and Wyoming.

19. That Defendant Bank advertised the sale in 14 newspapers, more particularly

described in Exhibit "NN" attached hereto.

20. That the personal property sold at the sale on June 10, 1972, brought $65,914.70 as described and set forth in Exhibit "OO", pages 1 through 5, attached hereto.

21. That the expenses of said sale held on June 10, 1972, amounted to $7,291.26, as described and set forth in Exhibit "PP" attached hereto.

22. That at the sale on the 10th day of June, 1972, the following amounts were the highest amounts bid for the following items:

M-V Enterprises Feedlot	$150,000.00
Agri-Services Elevator	50,000.00
Musselshell Elevator	No Bids
Melstone Feed Lot	No Bids

DATED this 24th day of May, 1973.

TOWE, NEELY & BALL
2822 First Avenue North
Billings, Montana 59101
Attorneys for Defendant

By s/TET

IN THE DISTRICT COURT OF THE FOURTEENTH JUDICIAL DISTRICT FOR THE STATE OF MONTANA, IN AND FOR THE COUNTY OF MUSSELSHELL

AGRI-SERVICES, INC., M-V ENTERPRISES, INC., M & S CATTLE FEEDERS, and L. D. STENSVAD CATTLE CO., all Montana corporations,	No. 7052
Plaintiffs,	Filed
-vs-	12/15/78
THE MINERS AND MERCHANTS BANK OF ROUNDUP, MONTANA,	
Defendant.	

OPINION

This action arises from a cattle-feeding operation located at Roundup and Melstone, Montana. The banking relationship between L. D. Stensvad and the Miners and Merchants Bank of Roundup, Montana, hereinafter "Stensvad" and the "Bank", commenced in 1965.

During 1965 and subsequent years, the Bank loaned to Stensvad funds for the pur-

chase and feeding costs of cattle which Stensvad fed for his personal account. In November of 1968, Stensvad purchased feed-mill facilities at Roundup, Montana, which substantially expanded his capacity to feed cattle. In the Spring of 1968, he acquired 300 acres of land near Roundup and completed construction of a 3,500 head feed-lot. In the Fall of 1969, an opportunity arose to place investor-owned cattle in Stensvad's feed-lots. The investors desired financing to allow them to purchase cattle on margin and to feed cattle on margin. Arrangements were made between the Bank and various investors whereby the Bank loaned to the investors funds for the purchase and feeding costs. The program was quite popular with such investors and the feed-lot at Roundup was expanded with temporary facilities to accommodate additional cattle.

As of the beginning of 1970, the Bank indicated an inability to provide purchase-

money financing for the expanding investors-feeders group. As a result, this portion of the financing was placed with the Production Credit Association of Lewistown, Montana, during the Spring of 1970, with the Bank continuing to provide financing for the feeding costs of the cattle.

However, in order to simplify its record-keeping, the Bank requested and obtained a change in procedure which allowed the Bank to loan the feeding cost funds directly to one of the four plaintiff corporations which were created for the purpose of conducting this business.

During the Summer of 1970, the Bank advanced funds for the construction of additional feed-lot capacity at Roundup, Montana, as well as for feed. The Production Credit Association made loans to investors for the purchase of cattle to be fed at the facilities.

It is within this course of conduct

of the parties that the Court views the evidence relating to the claimed existence and breach of contract between the plaintiffs and the defendant.

In June of 1971, Edward Towe, a principal stockholder of the Bank, indicated to Stensvad his intention to withdraw as a participant in this cattle-feeding program unless Stensvad withdrew his efforts from the creation of a new bank in Roundup, Montana. Meetings between the Bank and Stensvad culminated in Stensvad's agreement to withdraw from the formation of the new bank and the Bank's agreement to continue to provide financing as it had previously done for the cattle-feeding program operated by Stensvad and the four plaintiff corporations. In furtherance of this renewed committment to continue, the plaintiffs furnished to the Bank a complete portfolio of security interests in the plaintiffs' assets, as well as the guarantee of Otto Stensvad. This security

was provided from time-to-time between June 1971 and October 1, 1971.

As of approximately September 7, 1971, the Production Credit Association of Lewistown, Montana offered to increase its participation in financing the investor's feeding program operated by the plaintiffs. In essence, the Production Credit Association offered to finance a portion of the feed costs which would be incurred in fattening investor cattle.

During September of 1971, meetings between the Bank, the plaintiffs and the Production Credit Association were had, culminating in the creation of a new three-party contractual relationship in connection with the feeding program. In essence, the parties agreed that the Production Credit Association would provide all of the financing for the purchase of investor cattle as well as a portion of the financing for the feed for those cattle. The feed-financing component

would only apply to new investor cattle placed in the feed-lots pursuant to agreements with investors which allowed for such Production Credit Association financing. The Bank would continue to provide the remaining operating capital required by the plaintiffs and would continue as well the financing for the fixed assets of the plaintiffs. The plaintiffs would continue their efforts to procure cattle and investors to place in the program.

It is worth noting that this modification of the agreement between the parties, allowing for increased Production Credit Association feed financing, was to apply only to newly-placed cattle, with the cattle then in the feed-lots to be handled in the manner prior to September 7, 1971.

In conjunction with these meetings, Stensvad prepared a memorandum setting forth the terms of the agreement between the parties as it applied to the cattle-feeding program with the increased Production Credit Associa-

tion feed financing. This memorandum set forth a limit of $500,000.00 for operating funds for all of the plaintiff corporations.

In contravention of the agreement reached with the plaintiffs and the Production Credit Association, the Bank, unilaterally and without notice, limited, by Board resolution, its participation in the financing. A copy of this resolution was forwarded to the Production Credit Association and to the plaintiffs. The resolution stated that it was made "due to a change of circumstances." However, the defendant has wholly failed to adduce evidence of any circumstances which would justify its unilateral withdrawal from the contractual relationship between the parties. Therefore, the Court views the resolution of October 7, 1971 as a breach of contract without legal excuse or justification.

As a result of the breach of contract by the Bank, neither the plaintiffs nor the

Production Credit Association were in a position to meet their contract obligations, either between themselves or to investors, since the cattle-feeding program relied upon the firm contract committment of each of the parties: the plaintiffs, the Production Credit Association, the investors, and the Bank.

Although meetings were held between the parties during the month of October, 1971, these meetings did not result in a cure of the defendant's breach.

It is note-worthy that in the latter part of October 1971, the Bank's own personnel characterized the problem as being one of their own making and indicated an inability to arrive at a solution.

As a result, the Production Credit Association notified the plaintiffs of its election to terminate its contract with the plaintiffs and foreclosure proceedings were instituted by the defendant.

The Court finds that these foreclosure proceedings were caused by the Bank's breach of the contract and were, therefore, wrongful.

The Bank has contended that since it continued to loan money during the month of October 1971, it did not breach its agreements with the other parties. The Court is not persuaded by this contention since the nature of the contractual relationship between the parties required that each be able to rely upon the future performance of the other and the Bank never withdrew the resolution of October 7, 1971. The Bank adduced no evidence to show that its Board ever changed its position thereafter.

The Bank has also contended that the plaintiffs had exceeded the $500,000.00 operating limit as of October 7, 1971. The Court finds this contention by the defendant without merit since the limit was only to apply to the new program where the Production Credit Association financed feed for

investor cattle and the Bank's records show no increase in the total loan to the plaintiffs between September 30 and October 7, 1971. This is material since the Bank represented, both to the plaintiffs and to the Production Credit Association, that the total operating loan for the plaintiffs was $440,000.00 as of September 30, 1971.

In finding the existence of a contract and its breach, the Court has taken into consideration the extensive course of dealings between the parties and the Bank's complete familiarity with the investor feeding program. The Court believes that all of the parties were fully advised concerning the number of cattle which could be placed in the plaintiff's feed-lots and, therefore, were aware of the total financing required for the purpose and feeding of those cattle.

By reason of its breach of contract, the Bank caused the plaintiffs to lose their equity in their fixed assets. The total

value of those assets is, according to stipulation between the parties, $814,936.00, at cost, which sum is awarded plaintiffs. Since subsequent to the initiation of this action the Bank obtained controlling stock interests in the plaintiff corporations, the award will be jointly made to L. D. Stensvad personally and to the plaintiff corporations as representatives of the corporation's investing shareholders as follows:

STENSVAD and AGRI-SERVICES, INC.	$267,368.00
STENSVAD and M-V ENTERPRISES	$355,509.00
STENSVAD and M & S CATTLE FEEDERS	$192,059.00

The Court also awards the plaintiff the sum of $80,000.00 for the losses sustained by the plaintiffs during the process of the Bank's wrongful foreclosure, for loss of downpayments on cattle, for loss of livestock through death, and for losses sustained through the disruption in shipment of the cattle.

The plaintiff's also claim lost profits occasioned by the Bank's breach of contract. Subsequent to trial, the defendant moved to reopen the trial of this action to introduce evidence concerning the financial failure of Faunco Inc., which company operated certain of the physical assets of plaintiff after the Bank had obtained control of them. The Court grants the Bank's motion and will hear testimony concerning Faunco's financial failure in order to be completely advised of all relevant facts prior to ruling concerning an award of damages for lost profits. The Bank has proffered an affidavit concerning Faunco and may supplement such affidavit with additional evidence if desired. The Bank shall notify the plaintiff's counsel of any additional evidence to be offered and plaintiff shall be prepared to address such evidence at the hearing herein required.

Upon motion of the Bank prior to trial, the Court ordered the Bank's claims of set

off would be heard subsequent to trial. Evidence concerning these claims will also be heard by the Court on the 5th day of January, 1979, at a time and place convenient to the Court and counsel, at which time plaintiffs shall present to the Court proposed findings of fact, conclusions of law and judgment consistent therewith.

DONE at Shelby, Montana, this 14th day of December, 1978.

/s/ R. D. McPhillips
R. D. McPHILLIPS, DISTRICT JUDGE
PRESIDING

IN THE DISTRICT COURT OF THE FOURTEENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF MUSSELSHELL

* * * * *

AGRI-SERVICES, INC., et al., Plaintiffs, -vs- THE MINERS AND MERCHANTS BANK OF ROUNDUP, MONTANA, Defendant.	No. 7052 FINDINGS OF FACT AND CONCLUSIONS OF LAW Filed 3/27/80

* * * * * *

The matter having been heard by the Court acting without a jury, and certain post-trial motions having been considered and ruled upon by the Court, and plaintiff and defendant having been represented by counsel, and the Court being fully advised in the premises herein, now makes the following Findings of Fact and Conclusions of Law with respect to the Counterclaim in this action:

FINDINGS OF FACT

I.

That as of November 11, 1979,

Promissory Notes were due, owing, and unpaid in the amount of ONE MILLION TWENTY-TWO THOUSAND THREE HUNDRED TWENTY-FIVE DOLLARS AND 71/100 CENTS ($1,022,325.71).

II.

That said Notes provided for interest at the rate of eight and one-half percent (8 1/2%) per annum until paid, payable annually from the date thereof, with interest after maturity at ten percent (10%) per annum.

III.

That the interest due, owing and unpaid on said Notes through January 31, 1979, is approximately SEVEN HUNDRED TWENTY-SEVEN THOUSAND NINE HUNDRED NINE DOLLARS AND 20/100 CENTS ($727,909.20), such interest accruing at the rate of TWO HUNDRED SEVENTY-SIX DOLLARS AND 77/100 CENTS ($276.77) per day thereafter.

IV.

That said Promissory Notes provide for reasonable attorney fees in case of default

and collection thereon; that defendant found it necessary to retain an attorney for such purposes; however, because of the breach of the agreement by defendant herein and making it difficult for plaintiffs to cure the default, defendant ought to bear its own costs and attorney fees herein.

CONCLUSIONS OF LAW

I.

That the amount of ONE MILLION SEVEN HUNDRED FIFTY THOUSAND TWO HUNDRED THIRTY-FOUR DOLLARS AND NO/100 CENTS ($1,750,234.00) is due, owing, and unpaid for principal and interest on the Promissory Notes in defendant's Counterclaim herein, through January 31, 1979 and with added interest at the rate of TWO HUNDRED SEVENTY-SIX DOLLARS AND 77/100 CENTS ($276.77) per day for each day thereafter.

II.

That such amount is available as an offset against the amount of TWO MILLION ONE HUNDRED FORTY-TWO THOUSAND SEVEN

HUNDRED FORTY-TWO DOLLARS AND NO/100 CENTS ($2,142,742.00) due from defendant to Plaintiffs on Plaintiffs' Complaint herein.

DATED this 24th day of March, 1980.

/s/ R. D. McPhillips

R. D. McPHILLIPS, DISTRICT JUDGE

IN THE DISTRICT COURT OF THE FOURTEENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF MUSSELSHELL

L. D. STENSVAD, personally and as representative of the investigating shareholders) of AGRI-SERVICES, INC., M-V ENTERPRISES, INC., M & S CATTLE FEEDERS, AND L. D. STENSVAD CATTLE CO., all Montana corporations and on behalf of the corporations, Plaintiffs, -vs- THE MINERS AND MERCHANTS BANK OF ROUNDUP, MONTANA, Defendant.	No. 7052 FINDINGS OF FACT AND CONLUSIONS OF LAW Filed 3/27/80

* * * * * * *

This cause came on regularly for trial on September 7, 1976, before the Court sit-

ting without a jury. The parties stipulated to reserve hearing on the accounting on the defendant's counterclaim for a later date and such hearing was held on January 22, 1979. At both hearings the parties were represented by counsel, witnesses were sworn and testified and exhibits were offered and received in evidence. Both parties have submitted briefs post hearing. The Court counsel, together with their briefs, the cause being submitted for decision, the Court now makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

A. Parties:

1. L. D. Stensvad, hereafter "Stensvad" is the organizer and original majority shareholder of Agri-Services, Inc., M-V Enterprises, Inc., M & S Cattle Feeders, and L. D. Stensvad Cattle Co., during the period of time relevant to this action these were Montana corporations

in good standing.

2. Stensvad is the proper representative of the investing shareholders in the four plaintiff corporations.

3. The defendant, Miners and Merchants Bank of Roundup, Montana, now the Montana National Bank, hereafter the "Bank", is a banking corporation duly created under the laws of the state of Montana. It maintains and operates a banking institution in Roundup, Montana, and is in the business of extending credit, granting loans, and otherwise dealing in commercial transactions.

4. The Production Credit Association, hereafter "P.C.A.," is the Production Credit Association of Lewistown, Montana, which participated in the investor cattle-feeding program contracts which were the subject matter of this action.

5. The word investor, as used herein, refers to individuals who purchased cattle to fatten at the plaintiffs' feed lots using, in part, funds borrowed from the P.C.A. and the bank.

6. About November, 1968, plaintiff Agri-Services, Inc., contracted to buy, among other things, a local elevator and feed plant at Roundup, Montana, a business engaged in the purchase and sale of feed in that local area. Since then, until the fall of 1971, this corporation has maintained and operated this business at 415 Railroad Avenue East, Roundup, Montana.

7. Plaintiff M-V Enterprises, Inc., was the owner of a feed lot located adjacent to Agri-Services, Inc. It was in the business of feeding cattle there primarily for investor-owners of such cattle, at seven cents per day yardage, plus feed. It was not engaged in the cattle market and its uncertainties and was only providing services to cattle owners at a fixed price.

8. Plaintiff M & S Cattle Feeders maintained and operated a feed lot at Melstone, Montana. It was in the business of feeding cattle upon such property primarily for investor-owners of such cattle, at seven cents per day yardage, plus feed. It was not

engaged in the cattle market and its uncertainties and was only providing services to cattle owners at a fixed price.

9. Plaintiff L. D. Stensvad Cattle Company was in the business of (a) buying cattle to be placed in the feed lots herein mentioned, (b) securing investor-owners for such cattle, and (c) the supervision and maintenance of these various operations for the benefit of the plaintiff corporation.

10. Plaintiff L. D. Stensvad was the controlling stockholder, president of and the overall manager of these corporations and was charged with the responsibility of coordinating such enterprises.

11. Agri-Services, Inc., primarily operated a grain elevator and feed mill supplying products to the Cattle Feeders, its sister corporations.

B. The Course of Dealings Between the Parties.

1. Upon return from military service in 1965 Stensvad began a ranch based cattle-feeding operation at Melstone, Montana, and conducted his banking with the defendant bank.

Stensvad operated as a sole proprietor up until 1968 and from time to time had a line of credit with the bank in the range of $600,000.00 to $700,000.00. In the fall of 1968 Stensvad organized Agri-Services, Inc. for the purpose of purchasing a local elevator and feed mill at Roundup, Montana. The bank provided loan funds for the purchase, with the first loan to Agri-Services being made on November 19, 1968.

2. Shortly thereafter Stensvad purchased land near Roundup, Montana, and constructed a feed lot with a capacity of nearly 3,500 head, with the feed product furnished by Agri-Services, Inc.

3. The feed lot enterprise at Roundup was organized and incorporated as M-V enterprises, and Jack Dean, an investor's representative, contacted Stensvad to arrange for a cattle feed program for cattle owned by investors.

4. Dean and the bank arranged for the bank to make loans to investors for the purchase of cattle and for the feeding and for financing the feeding of the cattle.

5. Under the 1969 cattle-feeding program, the investor's down payment money was furnished directly to the bank, which deposited the funds in a separate account for the individual investor, together with the proceeds from loans made by the Bank to constitute the balance of the purchase price of the cattle.

6. Under the cattle-feeding program in the fall of 1969, the Bank loaned the money necessary to purchase feed to fatten the cattle directly to the investors.

7. The direct transactions between the out-of-state investors and the Bank were discontinued in 1970 because the Bank's examiners insisted that the Bank not loan money to persons not residing in the state of Montana.

8. Under the cattle-feeding program established in the fall of 1969, the Bank took notes from the California investors, as well as security interests in the cattle, to secure the credit extended by the Bank. Edward Towe, as Chairman of the Board of Directors and Chief Executive Officer of the Bank, was familiar

with and approved the arrangements constituting the 1969 cattle-feeding program.

9. As a result of the Bank examiner's exception to loans to out-of-state investors, the cattle-feeding program was changed so as to extend the credit directly to the plaintiff corporations for the purpose of financing the cattle and financing the feed for the cattle.

10. The loans made directly to the plaintiffs for out-of-state investor cattle were secured by the investors' promissory notes as before, such notes having been assigned to the defendant Bank by the plaintiffs. The approximate amount of such investors' notes used by the Bank for security was $1,000,000.00.

11. The demand for feed lot services under the investor cattle-feeding program exceeded the capacity of the plaintiffs' feed lots. Temporary pens were constructed in the late fall of 1969 and early winter of 1970 to accommodate 5,500 head.

12. Demand by investors for feed lot services greatly exceeded the capacity of the plain-

tiffs' feed lots. The plaintiffs, desiring to serve these additional investors, wanted to expand the program by making a substantial increase in the size of the feed lots and increase the number of cattle on feed. The Bank indicated it was unable to finance the purchase price of such large numbers of cattle and indicated that if an alternative source for the financing for the purchase of the cattle could be arranged, then the Bank would be able to finance feed costs for the expanded operation, as well as provide long-term financing for the capital improvements necessary to expand the plaintiffs' feed lots and feed mill.

13. The P.C.A. committed to finance the purchase price of investor cattle in March, 1970.

14. During the spring of 1970, the P.C.A. commenced providing the financing for the purchase of cattle to be placed in the plaintiffs' feed lots.

15. During the spring and summer of 1970, the defendant Bank furnished the funds to expand the capacity of the plaintiffs' feed lots.

16. On or before June 17, 1970, the Bank was aware that the anticipated capacity of the expanded lot at Roundup, Montana, would be 13,000 head.

17. The expansion of the feed mill and feed lots was completed by the fall of 1970 and large numbers of cattle were placed on feed with the P.C.A. financing the purchase price of the cattle and the Bank providing the capital to finance the feeding costs.

18. The Bank attempted to arrange an SBA loan for the long-term financing of the capital improvements, but was unable to do so because the volume of the business exceeded $1,000,000 per year and because the Bank's loans for the feed cost for investor cattle were made directly to the plaintiff corporations causing the corporations to have an unfavorable debt to equity ratio.

19. The Bank failed to provide long-term financing for the capital improvements as agreed, but rather simply renewed short-term notes from time to time. The Bank continued

the roll-over of notes until October 7, 1971, thereby providing the financing for capital improvement costs by renewal of short-term notes The allocation of proceeds paid the bank by plaintiffs was made by bank at its discretion and convenience.

20. During the fall of 1970 and the spring of 1971 substantial numbers of investor cattle were held on feed at the plaintiffs' feed lots. For the fiscal year ending 1971, M-V Enterprises, Inc. had gross sales of $1,472,979.64, with a gross profit of $200,890.28, with net income before provision for income taxes of $55,132.41.

21. The P.C.A. was well satisfied with the cattle-feeding program and used this program as a model program for other associations throughout the country. Stensvad had developed a reputation as a successful cattle feeder and had established business contacts with persons interested in feeding cattle throughout the western United States.

22. The loan arrangements which had initially been made between the investors and

the Bank were, during this period of time, made directly between the Bank and the plaintiffs with the investors furnishing promissory notes for the feeding expense for the corporations which were assigned to the Bank for security.

23. The P.C.A. advanced the purchase price of the cattle to the investors in reliance upon the Bank's agreement to provide financing for the feed costs for the cattle.

24. In addition to providing financing for the feed costs for investor cattle, the Bank provided other financing required by the corporations for accounts receivable, inventory interim cattle purchases, and other operating expenses.

C. Financing Agreement of June, 1971.

1. Prior to June, 1971, Stensvad had become involved with others in the formation of a new commercial bank at Roundup, Montana.

2. In June, 1971, Edward Towe notified Stensvad's attorney that unless Stensvad withdrew forthwith for the formation of a new bank, Towe would terminate all credit with both the Bank and the plaintiffs within 24 hours.

3. As a result, the meetings were held in June, 1971, between representatives of the Bank and representatives of the plaintiff corporations. At these meetings the parties reached agreement concerning the transaction of business between themselves as follows:

(a) Stensvad would withdraw from the formation of a competing bank;

(b) The Bank would continue to provide the financing required by the investor feeding operation with the P.C.A. providing the financing for the purchase of the cattle;

(c) The Bank would create long-term promissory notes for the capital improvement cost for the expansion of the feed lots and feed mill in 1970; and

(d) The corporations would furnish additional security to the Bank.

4. Subsequent to such meeting, Stensvad withdrew from participating in the new bank.

5. Subsequent to such meeting, the Bank rewrote notes for a portion of the capital improvement cost with 5-year amortized terms.

6. In order to comply with the terms of the June, 1971, agreement, L.D. Stensvad furnished security agreements in favor of the

defendant Bank, pledging the assets of the L.D. Stensvad Cattle Company, M-V Enterprises, Inc., and M & S Cattle Feeders.

7. In order to effect the terms of the June agreement, Agri-Services, Inc., executed a security agreement in favor of defendant Bank, pledging to the defendant Bank all of the assets of the said Agri-Services, Inc.

8. In order to effect the terms of the June agreement, L. D. Stensvad delivered as security to the defendant Bank an assignment of 10,000 shares of capital stock of Patten-Stensvad Cattle Feeders on July 14, 1971.

9. In order to effect the terms of the June agreement, the L. D. Stensvad Cattle Company executed a general assignment of accounts receivable to defendant Bank on July 29, 1971.

10. In compliance with the June agreement shareholders in the four plaintiff corporations delivered assignments, for security purposes, of a majority of the shares of the corporations.

11. In reliance of the terms of the June agreement, the corporation solicited customers, contracted for the purchase of feed, contracted for the delivery of cattle, and did all things necessary to conduct their business and secure customers for the feed lot.

12. As of June, 1971, the defendant Bank and its officers, Edward Towe and Wilbur Townsend, were fully acquainted with the nature of the plaintiffs' businesses and the financing requirements thereof. They were also aware that ample investors were available to essentially fill the plaintiffs' feed lots with investor cattle for the fall cycle in 1971.

13. Cattle were shipped and received at the feed lots throughout the months of July, August and September, 1971.

D. Modification of the Agreement of June, 1971.

1. On September 7, 1971, the P.C.A. at Lewistown, Montana, received approval from the Federal Intermediate Credit Bank of Spokane, Washington, to participate in feed financing for cattle financed by P.C.A.

2. The plaintiffs advised the defendant that the P.C.A. was prepared to extend credit for the payment of a portion of the feed costs incurred for P.C.A. financed cattle upon billing every fifteen days.

3. Shortly after September 7, 1971, a series of meetings was held involving the Bank, Stensvad, the P.C.A. and the four plaintiff corporations for the purpose of implementing the financing by the P.C.A. of a portion of the investor cattle feed expenses.

4. As a result of the meetings between September 16 and September 21, 1971, the parties reached an agreement as to the terms of the modification of the June, 1971 financing contract between the parties, such agreement being set forth in a Memorandum of Understanding, dated September 21, 19[illegible].

5. The terms of the June, 1971 agreement, as modified, according to the agreements reached between September 16 and September 21, 1971, included:

(a) The plaintiffs would furnish or

continue to furnish the defendant Bank security interests in all of the plaintiffs' assets.

(b) The Bank would continue to furnish financing for:

(1) The 4,000 to 5,000 head of cattle then in the plaintiffs' feed lots would continue to be financed under the June agreement, without modification;

(2) Feed financing sufficient to feed cattle under the modified agreement for thirty days;

(3) Interim financing for the purchase of new cattle;

(4) Feed financing for newly purchased cattle prior to their sale to P.C.A. financed owners;

(5) Feed financing for rancher owned cattle;

(6) Inventory and accounts receivable financing for Agri-Services, Inc.

6. The parties understood and agreed that the essential terms of the financing agreement of June, 1971, would remain in effect, to be phased out gradually as the business adapted to the modified program.

7. As of September 20, 1971, a total of 6,062 head of cattle were on feed at feed lots operated by the plaintiffs.

8. The parties agreed that as an overall part of the Bank's involvement in the financing program, once the old program had been phased out and the entire operation was being run under the new program, the combined "operating line" of the four corporations was not to exceed $500,000.00.

9. The combined operating line stood at $440,000.00 as of September 30, 1971.

10. No increases in the operating line outstanding were incurred, except for accrued interest between the dates of September 30, 1971, and October 8, 1971.

11. Pursuant to the modification of the

June financing agreement the parties executed documents delineating the their respective security interests and setting up mechanisms for the handling of funds on or about September 30, 1971.

12. The parties agreed to reallocate the lines of credit between the four corporations and consistent therewith Otto Stensvad agreed to furnish to the bank a modification of his guarantee so that it will apply to all of the four corporations, which guarantee was timely furnished.

E. Breach of Agreement.

1. On October 8, 1971, the defendant Bank notified the plaintiffs as follows:

> "Because of the change of circumstances of the agreement since your letter of September 21, 1971, the Board of Directors at the meeting held on October 7, the following motions were adopted:
>
> > "'The motion was made and seconded that present assigned income shall be received and applied to present notes with regard to all Stensvad Corporation loans and only the requested amount, namely $10.00 per head per 15 days for each animal in the feed lot shall be advanced in addition to advances needed to finance interm (sic) purchases of cattle for refin-

ancing through PCA.

> "'Motion made and seconded that no funds shall be advanced hereafter for interm (sic) financing of cattle purchased or for costs of feed in the Stensvad Cattle operation (all corporations) unless such cattle and the feed in question are to be fed to cattle located in the feed lots at Roundup and Melstone, only.'"

Under the terms of this notice, all income of the corporations was to be taken by the defendant Bank and applied to the payment of debts and only financing limited to $10.00 per head per fifteen days would be advanced for feed. The notice terminated financing for the approximately 6,000 head of cattle then on feed under the old program, accounts receivable, and inventory for Agri-Services, Inc., and all other financing which was to be provided pursuand to the June agreement, effective immediately.

2. The action taken by the Bank, as set forth in its memorandum of October 8, 1971, constituted a material breach of the contractual arrangements and agreements between the parties.

3. On October 11, 1971, the plaintiffs notified the defendant Bank of their election to treat the contract between the parties as breached by reason of the Bank's actions of October 7, 1971. This notice was delivered on the first business day following the receipt by the

corporations of notice of the Bank's October 7, 1971 resolution.

4. The officers of the bank were aware that the probable effect of its action taken on October 7, 1971, would be the inability of the plaintiff business to continue to function.

5. The action of October 7, 1971, by the Bank was communicated to the P.C.A. and the difficulties created by the bank's action caused the P.C.A. ultimately to notify the plaintiff of its intent to withdraw from the financing of investor owned cattle.

6. During the period of October, 1971, cattle which were purchased by the corporations for resale to investors were not placed with the investors on a timely basis due to uncertainties as to the Bank's willingness to perform its agreement to furnish financing.

7. On October 7, 1971, the plaintiffs total line of credit with the bank was $931,622.27. By taking all incoming proceeds and applying them to existing loans, while agreeing to advance only $10 per head every fifteen days to be

reimbursed by the P.C.A. the bank severally curtailed the operating capital of the corporations. By way of example:

Total Loans - October 7, 1971	$931,622.27
Portion Denominated Operating Capital - October 7, 1971	$440,000.00
Amount available to borrow on October 7, 1971, pursuant to resolution	$ -0-
Amount available at 5,000 head, yarded under the P.C.A. Feed Financing Agreement	$ 50,000.00

8. The P.C.A. could not provide financing for feed for investor owned cattle except new cattle and then only after investors had agreed to new financing documents.

F. Damages and Setoff.

1. By reason of the bank's breach of agreement with the plaintiffs, the plaintiffs lacked sufficient operating capital to be able to continue their business. In addition, the bank's action precipitated concern on the part of the Production Credit Association and others with whom the plaintiffs did business which further

rendered it impractical for the plaintiffs to continue to operate their business.

2. At no time did the bank's Board of Directors rescind the resolution of October 7, 1971.

3. The resolution of October 7, 1971 completely eliminated any financing for the cattle operation conducted by the plaintiffs at the Patton-Stensvad feed lot at Park City, Montana, even though capital stock of the Patton-Stensvad feed lot had been pledged to the bank to secure loans from the bank.

4. At various times, the bank has advanced different arguments in order to justify its action of October 7, 1971. At trial, the bank produced no evidence of "a change of circumstances" sufficient to justify its breach of contract in this matter.

5. The damages below found by the Court were reasonably foreseeable by the bank as the bank was intimately acquainted with the business operations of the plaintiffs.

6. The bank was aware that the plaintiffs' operations were profitable and was aware that

the plaintiffs were in a position to earn substantial profits in the year 1971 and subsequent years.

7. The bank was able to appropriate to itself the property of the plaintiffs only by reason of its wrongful breach of contract and did appropriate to itself all of the property, real and personal, of the plaintiffs, including much of the corporate stock of the plaintiffs.

8. The bank realized from the resale of personal property taken from the plaintiffs, other than cattle, the sum of $354,111.73, which sum the Court finds to be the reasonable value of the personal property other than cattle, wrongfully taken by the bank from the plaintiffs.

9. The utilization of the liquidation value for the personal property of the plaintiffs taken by the bank, other than cattle, is a reasonable method of valuation which produces a conservative value.

10. The cattle taken by the bank from the plaintiffs were sold for $520,000.00. The

bank established that it placed an investment in feed for such cattle in the amount of $139,000.00. Therefore, the Court finds the reasonable value of the cattle taken by the bank from the plaintiffs to be $382,000.00.

11. The foregoing method of valuation for the value of cattle taken by the bank from the plaintiffs is a reasonable and conservative method of valuation.

12. The cost of construction of the improvements of the feed lots and elevators taken by the bank from the plaintiffs was $814,936.00. The Court finds that such sum is a fair and reasonable value for the property taken by the bank from the plaintiffs.

13. The loss by the plaintiffs of their real and personal property to the bank was the proximate result of the bank's breach of contract. Such loss was a known and foreseeable consequence of the bank's action.

14. By reason of the bank's seizure of their assets, the plaintiffs lost, in addition, the sum of $80,000.00 due to the mishandling of

the plaintiffs' businesses by the bank. The plaintiffs are entitled to such sum as reasonable and foreseeable damages caused by the wrongful actions of the bank.

15. The total value of the property which the plaintiffs lost and which the bank took by reason of the bank's wrongful action is $1,551,047.00.

16. The bank's wrongful breach of contract prevented the plaintiffs from conducting their business and as a result the plaintiffs were foreclosed from earning profits in their business.

17. At the time of the bank's breach of agreement, the plaintiffs had qualified investor contracts sufficient to fill their feed lots to capacity.

18. The term of the investor feeding contracts between investors and the plaintiffs was for the time required to fatten for sale two cycles of cattle.

19. The bank was aware that the agreements with the investor cattle feeders contem-

plated the investor completing the fattening of two cycles of cattle.

20. The parties failed to specifically agree to a definite term for the financing agreement between them and the Court finds that a reasonable minimum term would be the term sufficient to complete the pending business on hand at the time of notice of termination, which would be not less than the time required to reasonably complete the fattening of two cycles of cattle.

21. The lost profits of the plaintiffs are only those profits which would have been earned during the term of the agreement.

22. The bank was completely familiar with the terms and conditions of the investor cattle feeder arrangements, having participated in the investor feeding program from its inception, and the bank knew that the plaintiffs, the bank, and the Production Credit Association each had to perform their various contractual obligations in order for the business of the plaintiffs to be successfully conducted.

23. During the period that the bank operated the cattle feeding operation of the plaintiffs, having wrongfully taken control of the same, the bank itself realized the profit of $104,889.73, which profit reasonably belongs to the plaintiffs.

24. The plaintiff corporation L. D. Stensvad Cattle Co. derived net profits from fees charged cattle owners for yardage services, and from the 12 1/2% bonus based upon the cattle owners' profit from the sale of cattle. Plaintiffs' trial exhibits 52 and 53 reasonably show the relationship between the numbers of cattle on feed, market conditions, and plaintiff's profits.

25. Under conditions which are known to have existed subsequent to the bank's breach of contract, the plaintiffs' profits which would have been derived from the completion of business then on hand are reasonably estimated at the sum of $511,695.00, being the amount the plaintiffs would reasonably have been expected to realize

from yardage fees and 12 1/2% bonus payments based upon the completion of existing business.

26. The total damages reasonable foreseeable and proximately caused by the bank's breach of agreement with the plaintiffs are:

Loss to rights of property and damages	$1,631,047.00
Loss of profits from existing business	$ 511,695.00
Total	$2,142,742.00

27. For convenience in analyzing the evidence, the Court adopts November 11, 1971 as an accounting date for the setoff because the bank commenced compilation of adequate accounting records on that date. As of November 11, 1971, the plaintiffs were indebted to the bank for all borrowings in the amount of $1,022,325.71.

28. The aforementioned outstanding debt owed the bank by the plaintiffs arose from and was an integral part of the agreement between the bank and the plaintiffs, which the bank breached.

29. The plaintiffs' obligation to pay interest to the bank arose as an integral part

of the contract between the parties, which the bank breached.

30. The property wrongfully taken from the plaintiffs by the bank was of a value in excess of the debt outstanding between the plaintiffs and the bank at the time of the taking.

31. The bank's wrongful taking of the possession of the assets of the plaintiffs made it practically impossible for the plaintiffs to perform their agreements with the bank.

32. From the foregoing Findings of Fact, the Court now makes the following:

Conclusions of Law

1. As of October 7, 1971, there existed a contract between the plaintiffs and the bank which required the bank to provide financing as set forth herein in the Findings of Fact.

2. On October 7, 1971, and thereafter, the bank materially breached the agreement without legal cause or excuse.

3. By reason of its breach of agreement, it is arguable the bank ought to lose entitlement to interest on the outstanding loans between the bank and the plaintiffs, the duty to pay such interest arising from the agreement between the bank and the plaintiffs which the bank breached. However, the Court could find no law to support such a conclusion of law. Interest is due defendant bank.

4. The total damages caused the plaintiffs by the bank's breach of agreement and wrongful taking of the plaintiffs' property reasonably amounts to the sum of $1,551,047.00, plus lost profits.

5. By reason of the bank's breach of agreement, the plaintiffs lost profits from future operations. The evidence shows such lost profits can be reasonably established at $511,695.00.

6. The damages sustained by the plaintiffs were foreseeable and were caused by the bank's wrongful conduct.

7. The bank is entitled to a setoff of

$1,750,234.00 as of January 31, 1979, by reason of the plaintiffs' indebtedness to the bank.

8. The plaintiffs are entitled to judgment against the bank in the amount of $392,508.00 after deducting such setoff.

9. L. D. Stensvad, personally and as representative of the interests of the party plaintiffs, is the proper party plaintiff in this action.

10. The costs incurred by the bank by reason of its wrongful taking of the plaintiffs' property are not chargeable to the plaintiffs.

The Court adopts the foregoing Findings of Fact and Conclusions of Law, together with its Memorandum Opinion of December 14, 1978, as its Findings of Fact and Conclusions of Law pursuant to Rule 52 of the Montana Rules of Civil Procedure.

Let judgment be entered accordingly.

Done at Shelby, Montana on this 24th day of March, 1980.

/s/ R. D. McPhillips

R.D. McPHILLIPS,

DISTRICT JUDGE

IN THE DISTRICT COURT OF THE FOURTEENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF MUSSELSHELL.

L. D. STENSVAD, personally and as representative of the investing shareholders of AGRI-SERVICES, INC., M-V ENTERPRISES, INC., M & S CATTLE FEEDERS, and L. D. STENSVAD CATTLE CO., all Montana corporations and on behalf of the corporations, Plaintiffs, -vs- THE MINERS AND MERCHANTS BANK OF ROUNDUP, MONTANA, Defendant.	No. 7052 JUDGMENT ******** Filed 4/2/80

The Court, having made and entered its Findings of Fact and Conclusions of Law herein, dated the 24th day of March, 1980, now enters judgment based thereon in favor of the plaintiffs and against the defendant in the total

amount of Three Hundred Ninety-Two Thousand Five Hundred Eight Dollars ($392,508.00).

JUDGMENT entered this 27 day of March, 1980.

/s/ R. D. McPHILLIPS

DISTRICT JUDGE

cc: Kenneth D. Tolliver

Gerald Neely

IN THE DISTRICT COURT OF THE FOURTEENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF MUSSELSHELL

L. D. STENSVAD, personally and as representative of the investing shareholders of AGRI-SERVICES, INC., M-V ENTERPRISES, INC., M & S CATTLE FEEDERS, and L. D. STENSVAD CATTLE CO., all Montana corporations and on behalf of the corporations, Plaintiffs, -vs- THE MINERS AND MERCHANTS BANK OF ROUNDUP, MONTANA, Defendant.	)	No. 7052
	)	JUDGMENT NUNC PRO TUNC
	)	Filed 6/27/80

It appearing to the Court that the Judgment heretofore entered by the Clerk in the above-entitled action is not a correct memorial of the Judgment as rendered and announced by this Court in that said Judgment as rendered and announced by the Court fails to deduct therefrom the daily interest on the counterclaim at

$276.77 per day for 426 days, or $117,904.00.

WHEREAS, through inadvertance and clerical error said amount was not deducted from the sums otherwise allowed Plaintiffs,

IT IS HEREBY ORDERED that judgment heretofore entered by the Court in the above-entitled action on March 24, 1980 be, and the same is hereby, corrected to conform to the actual Judgment announced and rendered by the Court by deducting from the Judgment the following sum: $117,904.00.

IT IS FURTHER ORDERED that this order correcting the record of said Judgment be entered nunc pro tunc to appear of record as of March 24, 1980, that being the date when said judgment was originally made and entered.

DATED this 23 day of June, 1980.

/s/ R. D. McPhillips

DISTRICT JUDGE

No. 80-210

IN THE SUPREME COURT OF THE STATE OF MONTANA

1981

L. D. STENSVAD, personally and as representative of the investing shareholders of AGRI-SERVICES, et al.,

Plaintiffs and Respondents,

vs.

THE MINERS AND MERCHANTS BANK OF ROUNDUP, MONTANA,

Defendant and Appellant.

Filed 1/7/82

Appeal from: District Court of the Fourteenth Judicial District, In and for the County of Mussellshell Honorable R.D. McPhillips, Judge Presiding.

Counsel of Record:

For Appellant:

Towe, Ball, Enright and Mackey, Billings, Montana

Thomas Towe argued, Billings, Montana

Gerald Neely argues, Billings, Montana

For Respondents:

Wright, Tolliver, Guthals and Prater,

Billings, Montana

Kenneth Tolliver argued, Billings, Montana

Submitted: September 16, 1981

Decided: January 7, 1982

Filed: Jan. 7, 1982

Thomas J. Kearney

Clerk

Mr. Justice John C. Sheehy delivered the Opinion of the Court.

Appeal is by Miners and Merchants Bank from a judgment rendered against it on Stensvad's complaint in the District Court, Fourteenth Judicial District, Musselshell County. The bank had counterclaimed against Stensvad on unpaid promissory notes.

The District Court found that the bank had breached an agreement to finance Stensvad's corporations and after that breach had converted or appropriated his property, resulting in damages to Stensvad of $1,631,047, plus lost profits in the sum of $511,695. The court granted a set-off of $1,750,234 as of January 31, 1979 by reason of the indebtedness of the plaintiff to the bank. The court's net judgment of $1,750,234 as of January 31, 1979 by reason of the indebtedness of the plaintiff to the bank. The court's net judgment of $392,508 against the bank was subsequently reduced nunc pro tunc by deducting $117,904 on June 23, 1980.

The resulting judgment against the bank is $274,604.

The bank appealed from the judgment. There is no cross-appeal.

This action arises from a cattle-feeding operation located at Roundup and Melstone, Montana. The banking relationship between L. D. Stensvad and the Miners and Merchants Bank of Roundup (hereinafter Stensvad and the bank) commenced in 1965. The activities of the four corporations, all of which L. D. Stensvad represents in this case, played intertwining roles in the operation. Originally L. D. Stensvad Cattle Company would buy cattle and place them for feed in feedlots operated by M & S Cattle Feeders and by M. V. Enterprises, Inc. Agri-Services, Inc. purchased feed which it sold to the cattle feed operators. In reality, however, the four corporations for the purposes of this case are L. D. Stensvad, personally, although there were other investing stockholders not shown in the record.

During 1965 and subsequent years, the bank

loaned to Stensvad funds for the purchase and feeding of cattle for his personal account. In November 1968, Stensvad purchased feed mill facilities at Roundup, Montana, which substantially expanded his capacity to feed cattle. In the spring of 1968, he acquired 300 acres of land near Roundup and completed construction of a 3,500 animal feedlot. In the fall of 1969, an opportunity arose to place investor-owned cattle in Stensvad's feedlots. The investors desired financing to allow them to purchase cattle on margin and to feed cattle on margin. Arrangements were made between the bank and the various investors whereby the bank loaned to the investors funds for the purchase of feeding costs. The program was popular with investors, and the feedlot at Roundup was expanded with temporary facilities to accomodate additional cattle.

In early 1970, the bank indicated an inability to provide purchase money financing for the expanding investors-feeders group. As a result, this portion of the financing

was placed with the Production Credit Association of Lewistown, Montana, during the spring of 1970, with the bank continuing to provide financing for the feeding costs of the cattle.

However, in order to simplify its record-keeping, the bank requested and obtained a change in procedure which allowed the bank to loan the feeding cost funds directly to one of the four plaintiff corporations which were created for the purpose of conducting this business. During the summer of 1970, the bank advanced funds for the construction of additional feedlot capacity at Roundup, as well as for feed. The PCA made loans to investors for the purchase of cattle to be fed at the facilities.

As of March 9, 1970, the PCA participation was on the following basis: the borrowers (the California investors) advanced the sum of $100 per head in cash, or part in cash and part by letter of credit so as to provide $50 per head for feed to be supplied by Stensvad, and $50 toward the purchase of the cattle. The

PCA agreed to finance the balance of the purchase price of the cattle.

Until such time as Stensvad completed his financing with the PCA on each purchase, he obtained interim financing from the bank. The monies advanced by the bank for the construction of additional feedlot capacity were carried by the bank on short-term notes, although the parties had in mind that such indebtedness would eventually be placed on long-term notes. As of June 1971, however, this had not been done.

In June 1971, Edward Towe, a principal stockholder of the bank, indicated to Stensvad his intention to withdraw as a participant in the cattle-feeding program unless Stensvad withdrew his efforts from the creation of a new bank in Roundup. Meetings between the bank and Stensvad culminated in a Stensvad agreement to withdraw from participation in the founding of the new bank and the bank's agreement to continue to provide financing as it had previously done for the cattle-feeding operation,

operated by Stensvad and the plaintiff corporations. In furtherance of this renewed commitment, the plaintiffs furnished to the bank a complete portfolio of security interests in the plaintiffs' assets, as well as a guarantee from Otto Stensvad, the father of the plaintiff.

The arrangement under the June meeting continued until August or September 1971, when the bank found that it was overextended on its loans to the Stensvad corporations. Its officers went to Stensvad and asked that he arrange for the PCA to take over the feeding costs which would be involved in the fattening of the cattle with the bank to handle the interim financing. On September 7, 1971, the PCA, through its executive committee, changed its financing arrangement to this extent:

1. The margin requirement from investors was kept at $100 per head in cash or $50 per head in cash and $50 per head letter of credit to be paid by the borrower to the PCA prior to the disbursement of any loan funds.

2. PCA would finance the full purchase

price of the cattle and provide $80 per head for feed. Feed requirements were to be budgeted by months, and PCA was not to advance these funds until the feed was actually consumed. No advancement of funds for stockpiling of feed was to be allowed. The feeder was to be paid by PCA upon presentation of invoices every two weeks.

On September 16, 1971, Stensvad wrote the bank setting out his need for interim financing after the changed PCA progra. He said:

> "This does not mean, however, that there will be no need for any operating capital for our feed yards because as each lot of cattle is fed, there will be a 30 day delay between the time said cattle are put on feed and any money is received from the P.C.A., for we will be on a 30 day billing program. Since we purchase our feed and pay weekly, you can see that we will need interim financing for this purpose. In addition, of course, interim financing will be necessary to pay for cattle purchased for custom feeders between the time the cattle are contracted for, or bought outright, and the time the P.C.A. pays for the same. There is also a need for interim financing for accounts receivable and inventory for our regular retail trade at Agri-Services . . .

"The question may arise in your minds as to why I still need $500,000 operating capital when I have stated that I am having my feed financed by the P.C.A. This is explained above and I will further clarify it here. I will still need operating interim financing for a 30 day period for feed being fed to cattle owned by custom feeders. The security therefor [sic] would be accounts receivable. The inventory necessary for each company for interim financing for cattle contracted for and purchased by L. D. Stensvad Cattle Co., an expected increase in accounts receivable and inventory at Agri-Services . . ."

On Friday, September 17, 1971, another meeting was held at the bank between representatives of the bank, and Stensvad and Stensvad's attorney. In essence, the parties at that time agreed:

During the transaction period from the old PCA program to the new, there would be 4,000 or 5,000 head of cattle under the old program, and as each pen was sold, Stensvad would repay the Miners and Merchants Bank the amount of money advanced by it when those cattle were put on feed. Since new cattle were being purchased under the new program to replace the cattle sold, and because of the proposal to build

up the number of cattle to as many as 13,000 to 15,000 head, the bank agreed "to immediately reloan the amount of money repaid to the Miners and Merchants Bank when each pen of cattle under the old program has been sold to enable me to feed the cattle for the 30 days" before the PCA provided the feed monies.

Stensvad confirmed the Friday, September 17, 1971 agreement in a letter of September 21, 1971, setting forth substantially what is said above here, and in addition stating:

> "It was explained to the Miners and Merchants Bank that under the old program, the operating capital which had been extended to me amounted to $402,000. That under the new program, the total amount of operating capital which would be necessary would still amount to a total amount of $500,000, but that the operating capital would be earmarked as follows: [setting out the allocation between the 4 Stensvad corporations]."

On September 30, 1971, another meeting was held between the representatives of the bank and Stensvad. The only written evidence of the meeting is provided by Wally Otto, the PCA representative, who prepared a memorandum of the meeting. The bank apparently decided

that the financial condition of the Stensvad operation was deteriorating badly. Otto reported that the current balance due to the bank was $440,000, secured by 1,000 head of cattle, not assigned, and 2,000 head of cattle, contracted for but not delivered, feed inventory of $90,000, accounts receivable of $180,000, machinery at $35,000, and prepaid fees to Stensvad.

The bank then requested thr PCA to make all future checks jointly payable to the bank and Stensvad to which all parties agreed. The bank gave PCA a general release covering the cattle purchased and the feed paid for under the new program and the bank delivered also to the PCA manager an assignment that it had received from Stensvad granting to the bank all of L. D. Stensvad Cattle Company's rights to monies after the investor loans had been paid.

The record is unclear as to what occurred between September 30 and October 7, 1971. However, on October 7, 1971, the Board of Directors of the bank adopted the following

resolution with regard to the Stensvad operations:

> "The motion was made and seconded that present assigned income shall be received and applied to present notes with regard to all Stensvad Corporation loans and only the requested amount, namely, $10.00 per head per 15 days for each animal in the feed lot shall be advanced in addition to the advances needed to finance interm [sic] purchases of cattle for refinancing through PCA.
>
> "Motion was made and seconded that no funds shall be advanced hereafter for interm [sic] financing of cattle purchased or for costs of feed in the Stensvad cattle operation (all corporation) unless such cattle and the feed in question are to be fed to cattle located in the feed lots at Roundup and Melstone, only."

Stensvad was notified of the resolution by letter on October 8, 1971.

In the time that elapsed between the June meeting and September 1971, Stensvad, although requested, had not presented the bank with financial statements. Sometime, the date is unclear, the bank received statements reflecting the financial condition of the corporations. L. D. Stensvad Cattle Company was particularly in bad shape. The accountant's report showed a negative balance of about $271,000. Of the

assets claimed by the corporation, approximately $150,000 represented bounced checks, and one of the liabilities was for nearly $385,000 for prepaid feed.

On October 11, 1971, by letter from Stensvad's attorney, Stensvad notified the bank that he considered the directors' resolution a breach of the agreements made between Stensvad's corporations and the bank. The letter demanded that the bank assume control of the physical plant and operations of the company. Stensvad claimed he had no operating funds with which to pay employees, purchase feed or pay other expenses because of the Board of Directors decision of October 7.

By letter of October 14, 1971, the bank confirmed to the PCA representative that he would continue to finance the interim funds necessary for operating money until permanent financing was obtained from the PCA through its commitment of October 11, 1971. On October 19, the PCA wrote to Stensvad's corporations that it was notifying the investors in

the cattle feeding program of the assignment of the monies to the bank. Apparently at this time Stensvad was "out of trust" with the investors.

On November 16, 1971, the bank advised PCA that it would continue its loan arrangements with the Stensvad Cattle Company for the interim purchase of cattle and their feeding subject to a limitation of $5 per head per week. Also on November 16, 1971, the bank issued a letter stating it was taking over all the assets of the Stensvad Corporations and notified all that no cattle were to be removed from the feedyards or sold without first making arrangements with the bank.

Over the course of the next several months, the bank sold the assets of the Stensvad corporations. The sale of personal property resulted in the recoupment of $354,111.73. The cattle were eventually sold for $520,000. The real estate was foreclosed upon, and eventually sold to Faunco, another company which thereafter hired Larry Stensvad to run the cattle operation.

The District Court found that the commitment of the bank to finance the Stensvad corporations in the manner agreed to in June and in September 1971 was a binding agreement upon the bank; that no "change of circumstances" occurred between September 17 and October 7, 1971 when the bank's board of directors adopted the resolution we have set forth above; that the effect of the resolution was to eliminate any financing for the cattle operation conducted by the plaintiffs, to severely limit the corporation's ability to do business and to cause the eventual withdrawal of the PCA from financing the Stensvad operations.

The District Court, in reaching judgment, adopted November 11, 1979, as the accounting date between the parties. As of that date, the court found that Stensvad was indebted to the bank for all borrowings in the amount of $1,022,325.71. The District Court concluded that the bank was entitled to interest, though it had found that the bank had breached the agreement to finance. Based on valuations

which the District Court found the property to be worth at the time of the foreclosures and sales, and its computation of lost profits, the court entered a judgment based on the following elements:

DISTRICT COURT AWARD

A. STENSVAD CLAIM

1.	Conversion of personal property--	$354,111
2.	Conversion of cattle----------	382,000
3.	Conversion of feed-lot & elevators----	814,936
4.	Mishandling of business----------	80,000
5.	Lost profits ------	511,695
		$2,142,742

B. BANK COUNTERCLAIM

1.	Principal-------	$1,022,325
2.	Interest through 1/31/79-	727,909
3.	Interest from 2/1/79 to judgment	117,904
		$1,868,138

NET JUDGMENT TO STENSVAD---------- $ 274,604

The issues argued by the bank in this appeal are as follows:

1. Whether the bank agreed to finance the Stensvad operation sufficient to keep the Stensvad companies in operation and sufficient to complete the business on hand or not less than the time required to complete the fattening of two cycles of cattle?

2. Whether, if such an agreement is found to have existed, it is unenforceable on grounds of indefiniteness, lack of mutuality, or failure of consideration?

3. If such an agreement is found to be enforceable, whether it was terminable at will or breached by the bank?

4. Whether, if such an agreement is enforceable and not terminable at will and breached by the bank, the evidence supports the awarding of any damages?

a. Whether any damages are limited to the agreed interest rate and the interest rate required to obtain the money elsewhere?

b. If not, whether the proper measure of

damages is at most the amount of lost profits plus mismanagement of assets?

c. Whether lost profits, if any, were proximately caused by the bank resolution of October 7, 1971?

d. Whether there is any reasonsonable certainty that any lost profits would have in fact occurred?

e. If so, whether the District Court erred in allowing testimony and exhigits showing gross profits per animal?

f. If not, whether the level of lost profits awarded is appropriate?

g. Whether the damages awarded for mismanagement of assets find support in the evidence, should have been admitted, are a duplication of lost profits, and are excessive?

h. Whether the award of the cost of the fixed assets in the amount of $814,936 is supported by the evidence, excessive in amount, or even available in conversion?

5. Whether the District Court erred in vacating its earlier order for a summary judg-

ment in favor of the bank?

The respondent urges that the findings made by the District Court were proper in all respects, and additionally, although it has not cross-appealed, urges that the District Court erred in allowing interest to the bank after the bank's breach of contract, and in failing to credit the cash funds received by the bank when liquidation of the Stensvad property against the loan balance before calculating interest due the bank.

THE BANK'S CONTRACT TO LEND MONEY

The first issue we must determine is whether the District Court erred in finding that a contract existed between the bank and Stensvad to finance the feeder operation.

The District Court found that as of September 21, 1971, agreements had been reached between the bank and Stensvad to the effect that Stensvad would furnish or continue to furnish the bank with security interests in all of the plaintiff's assets; that the bank would continue to furnish financing for the four to five thousand head of cattle then in the plaintiff's

feed lots, without modification; feed financing sufficient to feed the cattle under the modified agreement for30 days; interim financing for the purchase of new cattle; feed financing for newly purchased cattle prior to their sale to PCA financed owners; feed financing for rancher owned cattle, and inventory and accounts receivable financing for Agri-Services, Inc.

In the absence of an express agreement as to the term of the bank's contracts, the court determined that it was in the contemplation of the parties that the term would be related to the investor-feeding contracts, the time required to fatten for sale two cycles of cattle.

Presumably the consideration moving to the bank was the interest, at rates ranging from 8 1/2 percent to 10 percent per annum on the unpaid balances, that would be collected during the operation of the agreement. An extra element of prejudice, however, was the agreement of Stensvad not to engage in the formation of another bank in Roundup. Such consideration meets the statutory

definition of good consideration, section 28-2-801, MCA, a benefit agreed to be conferred upon a promissor to which the promissor is not likely entitled, or a prejudice suffered or agreed to be suffered by the promissee other than what he is at the time lawfully bound to suffer.

The District Court also concluded that the PCA participation in the Stensvad operation was dependent upon the agreement of the bank to furnish the necessary funds.

While the exact nature of the bank's agreement is arguable, especially as to term, the findings of the court must be supported on appeal where substantial evidence supports such findings and may not be set aside by us unless clearly erroneous. Rule 52(a), M.R.Civ.P.

The intention of the parties to a contract may be furnished by their conduct and declarations. Glantz v. Gabel (1923), 66 Mont. 134, 212 P. 858; section 28-2-103, MCA.

We conclude the District Court did not err in finding an agreement on the part of the bank

to finance the Stensvad operation.

THE AWARD OF $511,695 FOR LOST PROFITS

To support this award, the District Court found and concluded that the bank's wrongful breach of contract prevented Stensvad from earning profits in his business; that Stensvad had enough qualified investors to fill the lots to capacity; that the term of the investment contracts with the investors was the time required to fatten two cycles of cattle; that the bank's contract, though not expressed definitely, would reasonably require financing for two cycles of fattening; that Stensvad would realize net profits on yardage services, a 12 1/2 percent bonus from the investor's profits, and its anticipated feed profits; that a reasonable estimate of such profits was $511,695.

The bank objects to this item on the grounds that the Stensvad operation was not shown to be profitable; that the profits found by the court are gross, and not net profits, and are duplicative of other damages allowed.

The proper objective of an award of damages

for wrongful breach of contract is to place the party wronged in as good position as if the contract had been performed. Kirby v. Kinyon-Noble Lumber Company (1976), 171 Mont. 329, 332, 558 P.2d 452, 454. The bank contends that the measure of damages should be limited to the cost of obtaining money elsewhere, when money is wrongfully withheld. See Miller v. Federal Land Bank of Spokane (9th Cir. 1978), 587 F. 2d 415, 424, cert.den. 441 U.S. 962, 99 S.Ct. 2407, 60 L.Ed.2d 1067. Damages for loss of profits may be awarded if not speculative. Silfvast v. Asplund (1935), 99 Mont. 152, 161, 42 P.2d 452, 456. The rule that prohibits speculative profits does not apply to uncertainty as to the amount of such profits but to uncertainty or speculation as to whether the loss of profits is the result of the wrong and whether such profit would have been derived at all. Tri-Tron Intern. v. Velto (9th Cir. 1975), 525 F.2d 432, 437. Once liability is shown, that is the certainty that the damages are caused by the breach, then loss of profits on a reasonable basis for

computation and the best evidence available under the circumstances will support a reasonably close estimate of the loss by a District Court. Smith v. Zepp (1977), 173 Mont. 358, 370, 567 P. 2d 923, 930. But no damages are recoverable which are not clearly ascertainable both in nature and origin, and only profits which are reasonably certain may be awarded. Smith v. Fergus County (1934), 98 Mont. 377, 386, 39 P.2d 193, 195.

The award of lost profits in this case may be sustained only if we can say that the profits are not based on speculation, since no profit record of the Stensvad enterprises was shown prior to the breach. We find here clearly that the damages for lost profits are speculative. There is no reasonable certainty in the record that Stensvad lost profits as the result of the wrong, or that a profit would have been derived at all. Tri-Tron Intern., supra.

In reaching our decision on this phase of the case, we have looked at evidence presented

during the main trial, and in supplemental hearings. The procedural situation came about because the court ordered that the bank's claims of set off would be heard subsequent to the trial. The court made findings on all of the issues, except loss of profits by its order of December 14, 1978, and provided for supplemental hearings in that order respecting the loss of profits and additional evidence to be offered by the parties on the remaining claims.

A supplementary hearing was held before the District Court on January 22, 1979, and at that time, the parties entered into certain stipulations of fact, offered to enter into other stipulations of fact, and eventually agreed that affidavits or other forms of evidence would be offered to the court for its consideration.

Thereafter, on February 20, 1979, an affidavit of Larry D. Stensvad was filed setting forth his claimed valuation of certain items, including cost of assets, proceeds from the sale of personal property by the bank and other items. On March 27, 1979, the bank filed a

motion asking the court to adopt as facts certain proposed stipulations of fact which were attached to the motion, to take judicial notice of the accuracy of certain calculations, and to strike the affidavit of Larry Stensvad earlier mentioned. We find no record of how the court ruled on these motions, except that we find that some of the proposed facts were used in the court's final judgment from the affidavit of Stensvad.

Inasmuch as all relevant evidence is admissible (Rule 402, Mont.R.Evid.), we will advert to certain of the proferred evidence, as well as the record of the trial, in explaining why we determine that there is no reasonable certainty in the record or otherwise that Stensvad lost profits as the result of the claimed wrong of the bank, or that a profit would have been derived at all.

The financial statements for Agri-Services, Inc., show that on June 30, 1971, on total assets of $1,739.89. Included in the liabilities was an overdraft to the bank of $65,692.67. Cash on

hand was $2,793.36. The statement as of October 31, 1971, for the same corporation, showed retained earnings totaling $4,368.15 on total assets of $401,871.10. In that four month interim, however, the short-term notes payable to the bank had increased to $198,999.99, from $187,000.00 on June 30, 1971.

The financial statements for M & S Cattle Feeders, Inc., show as of November 30, 1971, retained earnings of $7,813.89 on total assets of $260,638.59. Claimed assets include a stock subscription reserve of $17,499.57. The notes payable to the bank increase from $82,500.00 on June 30, 1971, to $110,874.79 on November 30, 1971. On June 30, 1971, this corporation had no cash on hand, and an overdraft to the bank of $241.22.

The financial statements for M.V. Enterprises, Inc. show retained earnings before provision for income taxes of $55,261.86, on total assets of $336,261.51. Notes payable to the bank at that time are shown in the sum of $159,597.86. The accountants noted with

respect to the June 30, 1971 statement, that inasmuch as M.V. Enterprises, Inc. was part of a "brother-sister" group of controlled corporations, and the accountants not having been able to determine any inter-corporate transactions, the income tax liability could not be determined. We find no November 30, 1971 statement for M. V. Enterprises.

The financial statement of L. D. Stensvad Cattle Co. for June 30, 1971, is worthless. As it is, it reflects total assets of $421,802.55, and total liability of $692,860.72, for a negative net worth of $271,058.17. Even the claimed assets are questionable. The accountant reports:

> "NOTE 3. This amount of $76,500.00 is represented by a check of $45,000.00 that did not clear Mr. Wilson's bank and $31,500.00 that Mr. Wilson did not remit to L. D. Stensvad Cattle Co. on client's deposit. Collection probability not ascertained as of now.
>
> "NOTE 4. This $121,000.00 represents amounts withheld by Mr. Jack Dean from California cattle feeding clients as a commission. L. D. Stensvad Cattle Co. believes this is an error and steps to collect this are in process. Collection probability not ascertained as of now."

The liabilities include an item of $383,568.26 owed to Custom Feeding clients for advance payments on feed.

Most telling are the reports of the bank examiners who investigated the bankability of the loans made by this bank to the Stensvad corporations.

With respect to the Agri-Services, Inc. statement of June 30, 1971, the examiners noted:

> "The operating results mentioned above indicate insufficient cash flow to service and repay indebtedness over a reasonable period of time, there is no evidence of control of the proceeds of sales from inventory, and the extent to which collateral is shared between this loan and placed paper behind the SBA loan, indicates questionable margin at best. Furthermore, the indicated 7 1/2% owner equity is too small to be expected to protect against shrinkage in value in the event it should be necessary to resort to force liquidation."

With respect to M.V. Enterprises, Inc.:

> "A review of the checking accounts of subject and affiliated companies indicates frequent transfers of funds in substantial amounts between the various affiliates to cover checks being presented for payment and which apparently were issued without sufficient funds on deposit to cover at the time of issue or when originally presented here for payment. In view of

intercompany transactions and the apparent common controlling ownership vested in Larry D. Stensvad the borrowings of the affiliated companies must be considered together, and all of them appear to have the common weaknesses of undercapitalization and disproportionate total debt and short-term debt and virtually no working capital which necessitates reliance on credit to sustain operations."

With respect to M & S Cattle Feeders:

"Review by bank management subsequent to date of examination and subsequent to 60 M [$60,000] advance made by bank indicates current assets regarded as a source of repayment funds are limited to feed inventories aggregating 31.4 M [$31,400]."

With respect to L. D. Stensvad Cattle Co.:

"Checks on subject company have been issued in substantial amounts at times when insufficient funds were on deposit to cover them. In this connection it is observed that the checking account of this firm was overdrawn in the amount of $83,907.10 on 3-22-71 and the firm was indebted on loans here on that date in the amount of 110 M so that the liabilities of that firm were far in excess of subject banks lending limit on that date. Overdrafts have been noted on other occasions also.

"At the time of a return visit to the bank on 11-12-71 a fiscal year end (6-30-71) P.S. [financial statement] had not been received for the L.D. Stensvad Cattle Company, Inc. Despite the nearly 3 1/2 months since the end of the fiscal year reportedly the accountant for the firm has been unable to compile a financial statement that will balance or which he is prepared to certify and it has been indicated that

unresolved differences are in excess of 200 M, an amount between 2 and 3 times the NW [net worth] of the corporation in the 12-31-70 PS above. In the absence of the statement for this firm a consolidated PS for the affiliated corporations cannot be compiled, thus, the overall financial condition of the related firms cannot be determined. Furthermore the PSs on hand for the other corporations do not include information on intercompany receivables and payables that also would be needed for meaningful consolidation. Also, the bank is without information as to any obligations to other creditors of the L. D. Stensvad Cattle Company, Inc., and does not have a PS of Patton-Stensvad Cattle Feeders in which L. D. Stensvad has a minority (40%) stock interest and which has dealings with the L. D. Stensvad Cattle Company, Inc.

"It appears that the bank is providing virtually all of the operating capital for the various enterprises in addition to financing the fixed assets of the corporations and conclusive evidence of collateral coverage cannot be ascertained. Assets sufficient to cover liabilities is suggested but not definitely established and the bank is making every effort to exercise control of cash proceeds for application on debts here."

We turn now to examine the method used by the District Court in arriving at the lost profits figure of $511,695.00. In its findings of fact, the District Court found that L. D. Stensvad Cattle Company derived net profits from fees charged cattle owners for yarding services, and from 12 1/2% bonus based upon the

cattleowners' profit from the sale of cattle. It found that the profit figure of $511,695.00 is the amount the plaintiffs would reasonably have been expected to realize from yardage fees and the 12 1/2 percent bonus payments based upon the completion of existing business.

The District Court did not indicate what portion of the profit figure it attributed to bonus payments, however, it must have utilized plaintiffs' trial exhibit no. 49, which purported to establish a net margin for investors based on a 600 pound steer when purchased, and sold at 1,050 pounds for a gain of 450 pounds.

In that exhibit, figures are utilized from the United States Department of Agriculture which showed the price that feeder cattle would bring in Omaha on the same day. The difference was tabulated to find the gross margin on that day for the cattle investor. Offset against this margin was the cost of feed which the witness determined from barley prices published by the Montana Crop Reporting Service, plus 30 cents for freight and handling. From these

figures, based on the ratio of feed used to pound of weight gained, the witness computed a cost of gain, (averaging 20.8 cents per pound in 1972) which when multiplied by the theoretical 450 pound gain in the steer, produced the cost of feed for the steer. The difference between the gross margin and the cost of feed represented a net profit, on exhibit no. 49, to the cattle investor. The witness testified that irrespective of different prices that might prevail in the Roundup market or other Montana markets for the purchaser's sale of feeder cattle or fed cattle, the margin of profit could nevertheless be determined in the manner set forth in exhibit no. 49 because it would be the same nationwide. Such figures were computed for each month from November 1971 until December 1974 on exhibit no. 49. The evidence does not indicate the date of each month on which the computations were made. It is strongly speculative whether such figures had any relationship to the Stensvad feeder operation. Most important, no computation for

interest cost to the California investor that would be charged by the bank or by the PCA for the monies advanced by these institutions appears in exhibit no. 49.

Likewise, plaintiffs' exhibit no. 52 purports to show the income to be derived by Stensvad's operations, based upon the numbers of cattle to be fed in the pens from the business on hand on the date of the bank's alleged breach. A number is given in that exhibit for the average number of cattle per month, usually 13,000 head in the pens. Income is determined by multiplying the average number of cattle times 15 cents per day for 30 days. Offset against the income thus generated are fixed costs and variable costs. Fixed costs are shown as an unvarying $11,604.36. Variable costs are determined by multiplying the average number of cattle for that month by the figure of $1.44. The difference between the income generated, and the sum of the fixed costs and variable costs yields a profit to Stensvad on the exhibit.

When exhibit no. 52 was offered in evidence, it was stated that the computation for fixed costs and variable costs on that exhibit would be "connected up." However, such connecting up was never done. The result is a very speculative figure of profit used by the District Court in computing lost profits.

Stensvad contends in brief that the net operating profits of the Stensvad operation for the fiscal year ending June 1972 would be $207,615.12 and for the 1973 fiscal year $334,237.68. In addition, the bonus payments that would have been received under the projections would equal $230,985.00 for 1971-1972, and $103,400.00 for 1972-1973. The total of these figures is $876,237.80. The court's finding of lost profits is approximately 59 percent of this total figure. We are unable to determine, and no brief of the parties delineates the basis for the award.

We cannot escape the conclusion that on the basis of the record here presented and the underlying evidence, that the award of the court for

lost profits was based entirely on speculation, and no reasonable certainty appears to us to indicate that such profits were lost by the alleged wrong of the bank in refusing to further finance the Stensvad operations.

This is not to say that in a proper case, damages for lost profits are not recoverable, arising out of a breach by a lender of a contract to loan money. The authorities agree that such damages may be awarded, see Hunt v. United Bank & Trust. Co. (Cal. 1930), 291 P. 184, especially when the lender knows the intended use of the proceeds. In such case the profits which would have been made, as contemplated by the parties, are recoverable, Milbourn v. Buzzard (Okla. 1926), 252 P. 15, if they are established by factual data to a reasonable certainty, even in the absence of a past history of profitable operations. Welch v. U.S. Bancorp. Realty and Mortg. (Ore. 1979), 596 P.2d 947, 963-964. The borrower is not restricted in his damages to the cost of obtaining money elsewhere, as the bank contends in this case.

See Welch, supra

DAMAGES RECOVERABLE FOR BREACH OF CONTRACT

The District Court concluded, after finding that the contract to lend money existed, that the bank had breached its contract, and resultantly had taken over the property of Stensvad wrongfully. The damages awarded by the District Court are attacked from all directions by the bank. We have already indicated that the lost profits awarded by the bank are improper in this case. We turn now to examine the other elements of damages awarded by the court in favor of Stensvad.

There can be little argument that the amount of $354,111.00 for the conversion of personal property awarded by the court is proper. It is substantially supported in the evidence and was the subject of a stipulation between the parties.

The item for conversion of cattle, $382,000.00 includes a profit of $104,897.73 made by the bank in the difference between what the bank would have received had the cattle been sold in

November 1971, and the amount actually received at the later time of sale. The District Court, by awarding the full amount received by the bank from the sale of the cattle, $382,000.00, gave Stensvad the benefit of the profit made by the bank in making the sale as it did.

The item of $80,000.00 for mishandling of business, however, must be examined by us, and amended downward.

The District Court awarded Stensvad the sum of $80,000.00, for the "losses sustained by the plaintiffs during the process of the Bank's wrongful foreclosure, for loss of downpayments on cattle, for loss of livestock through death, and for losses sustained through the disruption in shipment of the cattle."

The evidence sustains $58,000.00 of that award. Larry Stensvad testified that at the time of the take-over by the bank, his operations had paid out $58,000.00 on agreements for the purchase of cattle, and that these sums were forfeited to the prospective sellers when Stensvad was unable to complete the contracts of

purchase. Such an item of damages is within the contemplation of section 27-1-311, MCA, with respect to the measure of damages for the breach of contract, because they were proximately caused by the take-over, and in the ordinary course of things would be likely to result therefrom.

The remaining part of the $80,000.00 award, that is the sum of $22,000.00, is apparently based on this portion of the record:

> "Q. Mr. Stensvad, I would like to direct your attention to the situation involving the cattle that were moved from the lot in Roundup to the lot at Melstone by the bank after the bank took control of these cattle. Did you have occasion to review the closeout figures produced by the bank, with regard to these cattle?
> A. The bank didn't produce the closeout figures on them. I produced the closeout figures on them.
>
> "Q. How did you obtain this information?
> A. Well, I had the information on what the cattle weighed when they went in down there, and then when the cattle were shipped, in terms of weight and numbers. And when the cattle were shipped out of the Melstone yards in the spring of 1972, I was there and obtained copies of the weights when the cattle went out, and numbers, so that I could compare the weights going out with the weights going in, as well as numbers. And then I also--the bank used forms that we were using at

the time, before they took over, to keep track of daily feed fed out to the cattle, while they had it. And I had the opportunity to have those records to prepare feed consumption and cost data on the cattle while they had them in there. Then I returned these documents to the yards down there, when I completed my calculations.

"Q. From these documents that you had at this point in time, did you prepare a calculation as to the amount of money that was lost by reason of the manner and means in which the cattle were cared for and fed. A. Yes, I did.

"Q. And what was that amount? A. The amount was a few dollars over $22,000.00."

Missing from the foregoing testimony is any basis upon which it could be determined that the bank overspent for feed, or underfed the cattle, or that the amounts spent by the bank in caring for the cattle until they were sold were unreasonable. Damages which are not clearly ascertainable in both their nature and origin cannot be recovered for a breach of contract. Section 27-1-311, MCA.

We next consider the award of $814,936.00 for the loss of Stensvad's feedlots and elevators. The District Court in its findings based this award upon the original cost of

construction and acquisition. Among the various values of the feedlot and elevators appearing in the evidence, the award is top dollar. On the books of three of the Stensvad corporations (L. D. Stensvad Cattle Co. had no fixed assets) the feedlots and elevators were carried at a depreciated value of $430,944.81 in total.

At the request of Larry Stensvad, in April 1972, Hall and Hall, appraisers from Billings, appraised the fair market value of the Melstone feedlot, the Roundup feedlot, the Roundup mill and rolling stock, and found a total market value of $488,000.00. At the time of the sheriff's sale on foreclosure, the bank bid in for the feedlot and elevators the sum of $200,000.00, and was the successful bidder. Later the bank contracted to sell the feedlots and elevators to Roundup Feeders, Inc., a corporation formed by the owners of the bank, for $350,000.00. Roundup Feeders, Inc. in turn leased the properties to a corporation named Faunco, Inc., for cattle feeding operations under the management of Larry Stensvad, which resulted in a payment of $176,731.00 lease

payments either to Roundup Feeders, Inc. or the bank, the record is not clear. On March 27, 1979, the bank offered to stipulate that as of June 30, 1971, the value of the fixed assets of the Stensvad corporations was $696,968.00.

In Bos v. Dolajak (1975), 167 Mont. 1, 6, 535 P. 2d 1258, 1260, we quoted with approval from Spackman v. Ralph M. Parsons Company (1966), 147 Mont. 500, 506, 414 P. 2d 918, 921, though it related to personal property, the following quotation:

> "As for the issue of compensatory damages, the question is always a difficult one. In tort actions, the wrongdoer is liable, in general, for any injury which is the natural and probable consequence of the wrong. These may include both the direct and indirect, but reasonably probable, results of the wrong. Where damage to the property is concerned, the purpose of awarding damages is to return the party injured to the same, or as nearly possible the same, condition as he enjoyed before the injury to his property. The injured party is to be made as nearly whole as possible--but not to realize a profit. Compensatory damages are designed to compensate the injured party for actual loss or injury--no more, no less."

In Bos, supra, we approved a measure of damages based on replacement cost of a silo, in an action

for breach of contract to erect a silo, but in that case it appeared that the replacement item was a second-hand silo and its cost was well within the actual market value of the silo that was destroyed. The fairest value of the feedlots and elevators in this case, found by a professional and untinged by any personal bias of the parties, is the fair market value found by Hall & Hall, the sum of $488,000.00. We find the District Court should have used that figure in a determination of the proper amount to be awarded to plaintiff for his ouster from the feedlots and elevators. It should be noted however, that Hall & Hall's appraisal included Stensvad's rolling stock. The value of the folling stock is already included in the personal property award of $354,111.00. The auction receipts from the sale of the rolling stock which were included in that amount were $66,064.70. We should in fairness deduct the value of the rolling stock from Hall & Hall's

appraisal of the feedlots and elevators, which leaves a net figure rounded market value of $411,935.00 as the proper value of the feedlots and elevators.

Accordingly, we amend the District Court's award of damages to Stensvad as follows:

1.	Conversion of personal property-	$354,111.00
2.	Conversion of cattle	382,000.00
3.	Value of feedlot and elevators--	411,935.00
4.	Mishandling of business	58,000.00
5.	Lost profits	0
	TOTAL	$1,206,046.00

THE SET-OFF TO THE BANK

The District Court found, and the parties agree, that the principal amount of the notes due and owing to the bank as of November 11, 1971, was the sum of $1,022,325. The District Court however, awarded interest on that amount to the date of the judgment. In view of the fact that the Stensvad property taken by the bank and sold as collateral for the indebtedness due it, exceeded in value as we have above shown the amount of the principle indebtedness, it is improper in this case to award interest to the bank on the note balances to the date of judgment.

Once the value of the collateral had been applied to the principle indebtedness through means of foreclosure and other sales, Stensvad's obligation for further interest on those notes to the extent of collection was obviously terminated. The bank is entitled to a set-off of no more than the amount of the principal indebtedness as of the date of the breach found by the District Court.

THE ISSUE OF SUMMARY JUDGMENT

When this action was first commenced, the then presiding district judge granted summary judgment in favor of the bank. Plaintiff filed a motion for reconsideration of the summary judgment when a second judge was qualified to sit on the cause. The second judge, considering the issues, reversed the summary judgment and opened the cause for trial. In spite of the bank's contentions to the contrary, it is clear that material questions of fact existed from the inception of this litigation and that the first entry of summary judgment was improper. We find no merit therefore in the

bank's contention that the District Court improperly reversed the stand on the summary judgment question.

CONCLUSION

The amount of the Stensvad claim, as we find it above is subject to a set-off to the bank in the sum of $1,022,325. We therefore remand this cause to the District Court with instructions to modify the judgment heretofore entered in this cause, and to enter judgment in favor of Stensvad in the sum of $183,721, which when paid, shall constitute full and final settlement of all claims of L.D. Stensvad, personally, and as representative of investing shareholders of the corporations and of the corporations. Interest on the amount of the judgment shall run from the date of its entry after remittitur herein. Costs to Stensvad.

John C. Sheehy
Justice

We Concur:

Mark I. Haswell
Chief Justice

Gene B. Daly

Frank R. Morrison, Jr.

Justices

Mr. Justice Fred J. Weber dissents:

I commend Justice Sheehy for his careful and competent analysis of the complex and confusing facts in this case. He has done an excellent job in putting together an understandable opinion.

I agree with the conclusion of the majority that the bank did have an agreement to loan money to the Stensvad interests. However, I find there was an ample factual basis for the termination by the bank of that agreement to loan money, and the subsequent taking of possession of the Stensvad properties. The majority opinion refers to the reports of bank examiners, who examined the Stensvad loan on November 12, 1971, just prior to the taking possession of the assets by the bank. The examiners point out that on November 12, nearly three and one-half months after the end of the fiscal year of Stensvad Cattle Co. Inc., the firm had been unable to compile a financial statement which would balance and which the accountant was prepared to certify. The examiners noted that as of June 30, 1971, checks had been issued in substantial amounts when insufficient funds were available

to cover. The majority opinion points out that as of June 30, 1971, L.D. Stensvad Cattle Co. had a negative net worth of $271,058.17 with questionable assets even on that statement. In addition, there is evidence that during the weeks prior to taking of possession by the bank, Stensvad failed to remit substantial funds to the bank, Stensvad had failed to make payments to his investors, and funds were being diverted to other feedlot operations in direct disregard of bank instructions. As pointed out in the majority opinion, during all of 1971, Stensvad was grossly under financed, which made his operations subject to any adverse turns in the market. All of these facts are a sufficient basis for the action taken by the bank. I would therefore hold that the bank properly took possession of the various assets which constituted security for the loans.

I do concur with the majority opinion that the award of lost profits at the District Court level was speculative and not sustainable. I also agree that the valuation of the personal

property in the amount of $354,111.00 and the value of the feedlot and elevators in the amount of $411,935.00 is correct. I would reduce the cattle valuation of $382,000.00 by the profit of $104,897.73 made by the bank because I would not find a conversion of the cattle. I would also eliminate the award of $58,000.00 for mishandling of business. Last, I would award interest to the bank after the appropriate reduction of its loan totals by the assets repossessed.

Fred J. Weber

Justice

IN THE SUPREME COURT

OF THE STATE OF MONTANA

L. D. STENSVAD, personally and as representative of the investing shareholders of AGRI-SERVICES, INC., M. V. ENTERPRISES, INC., M. & S. CATTLE FEEDERS, and L. D. STENSVAD CATTLE CO., all Montana corporations, Plaintiffs, vs. THE MINERS AND MERCHANTS BANK OF ROUNDUP, MONTANA, Defendants.	No. 80-210 PETITION FOR REHEARING Filed 1/15/82

1. GROUNDS AND ISSUES

A. Grounds. Appellant petitions for a rehearing of this Court's decision of January 7, 1982, on the grounds that:

(1) Questions decisive of the case submitted by counsel were overlooked by the Court.

(2) Facts material to the decision were overlooked by the Court.

B. Issues.

(1) Whether real estate can be the

subject of conversion.

(2) Whether the award of damages for personalty and fixed assets is barred by res judicata?

(3) Whether Bank profits on the business should have been allowed as a part of the value of property taken by the Bank.

(4) Whether interest should have been denied the Bank.

(5) Whether a bank can protect itself in an on-going enterprise loan by establishing an upper limit to the loan?

(6) Whether failure to state what the Bank did that constituted a breach will set an intolerable precedent for the lending industry in the State?

(7) Whether any breach was waived by the subsequent conduct of the parties?

(8) Whether the Court erred in relying on argument by Stensvad on claimed evidence not in the record and disputed by the Bank?

2. ARGUMENT

(1) Whether Real Estate Can be Converted?

(A) Conclusion: The Court overlooked the question of conversion of real estate, which question is decisive of the case, and the award to Stensvad should be reduced by $411,935.00, the amount awarded by the Court for conversion of real estate.

(B) Discussion. The District Court awarded damages for conversion of real estate, which this Court affirmed except as to the amount awarded, awarding Stensvad $411,935.00.

This Court properly noted the issue as raised by the Bank:

> "Whether the award of the cost of the fixed assets . . . is . . . even available in conversion?"

Paragraph 4(h), Opinion, p. 11.

In its initial brief, at p. 81, the Bank argued:

> "It is submitted that the Court erred in granting damages at all as to real estate on a theory of conversion lies only with respect to personal property and not real estate. [Citations of authority]."

There is no dispute as to the law or the facts on this issue. Neither in briefs nor in

oral argument did Stensvad reply to this argument, and it is submitted that it is a decisive matter overlooked by the Court and that the award to Stensvad should be reduced by $411,935.00.

By the award of these damages, does the Court intend to provide a Montana exception to the normal rule that real estate cannot be the subject of conversion?

(2) Whether the Award of Damages for Personalty and Fixed Assets is Barred by Res Judicata?

(A) Conclusion: The Court overlooked the question of res judicata as to previous judgments involving the same parties, the same property, and the same District Court relating to the disposition of the collateral, which question is decisive of the case. The award to Stensvad should be reduced by the amount of $354,111.00 awarded for personal property, $382,000.00 awarded for cattle, and $411,935.00 awarded for the value of the feedlot and elevators, and the indebtedness on the promissory notes should be considered after applica-

tion of all the proceeds from sale to those indebtednesses, not before.

(B) Discussion. The Court makes no reference to the Bank's arguments regarding the effect of previous judgments, relating to the very same property and the very same parties. It is submitted that that issue is decisive to the case and has been overlooked by the Court.

On its "Flow Chart of Damage/Arguments", at page 34 of the Bank's Reply Brief, at page 43 of that same brief, and in oral argument, the Bank advanced its argument the damage awards for conversion - - all of the damages awarded Stensvad except the $58,000.00 for mishandling of business - - were improper because of res judicata.

The Bank noted as follows in written argument:

> "Assuming a breach of agreement [to loan additional sums of money], such breach does not invalidate the proper foreclosure and sale pursuant to proper mortgage and security agreements [of existing loans]. In fact, such action was all done pursuant to properly authorized court proceedings including a mortgage foreclosure with the requi-

site one year of redemption, proper notices of sale and sale of personal property under court order. The proceedings and orders and judgments of these cases have not been appealed and their decisions are binding on the parties to this action, namely Stensvad [all parties Plaintiff] and the Bank. They are, in effect, res judicata and cannot be attached [citation to the Montana cases involved and the Court orders in the Appendix.]

In fact, at no time did Stensvad challenge the reasonableness of the sale or the values received at the sale; he even stipulated to the balance remaining on the notes after application of all sale or other proceeds. Further, there has been no contention that any of the proceeds from the sale of pledged assets were not properly applied."

P. 56, Initial Brief of Bank. See also p. 100 and Appendix pages 38-45, Initial Brief of Bank.

None of the above facts are disputed, and all were proven. See pp. 24-25 of the Bank's Initial Brief which sets out that proof.

Once it has been judicially decided (in another case involving the same parties before the same Court) that the sale was proper, the doctrine of res judicata bars awarding damages for the same transaction. The awards of $354,111 (personal property), $382,000 (cattle),

and $411,935 (real estate) should be stricken, and the indebtedness on the promissory notes should be allowed to the Bank after application of the proceeds from the judicially supervised sales. The parties stipulated this figure (after application of all sale proceeds and costs of sale) was $374,807.35. [Stipulation of Counsel, pp. 4-5, Supplemental Hearing, 1/22/79.]

(3) Whether Bank Profits on the Business Should Have Been Allowed as a Part of the Value of Property Taken by the Bank?

(A) Conclusion: The Court, in allowing the Bank profits on the sale of cattle to be added to the value of those cattle, overlooked its own ruling on value for purposes of damages and overlooked facts material to the decision, and the award to Stensvad should be reduced by the amount of $104,898.

(B) Discussion. In awarding $382,000 to Stensvad for the conversion of cattle, the Court in its opinion at page 23 affirmed the Lower Court's award of the $104,898.00 as lost profits:

"The item for conversion of cattle, $382,000.00, includes a profit of $104,897.73 made by the Bank . . . The District Court, by awarding the full amount received by the Bank from the sale of cattle, $382,000.00 gave Stensvad the benefit of the profit made by the Bank in making the sale as it did."

Supreme Court Opinion, p. 23.

The Court noted that these were profits the Bank made by selling the cattle at a later date than a sale in November of 1971 when the Bank first took possession of the cattle. The actual stipulation of the parties indicates that this was the net profit of the entire enterprises after takeover by the Bank:

"Mr. Tolliver: Stipulated. Let the record further reflect that the records of the Bank indicate that the Bank earned a net profit by operating the feed lot from November, 1971, until the date that such operation ceased in the Spring of 1972 . . . ."

Stipulation of Tolliver, p. 6, Supplemental Hearing, 1/22/78, Stipulated to by Towe on same page.

Thus, the award of the Court includes profits in the valuation of property for purposes of conversion damages.

Yet, This Honorable Court cited the case of Bos v. Dolajak, (1975), 167 Mont. 1, 6, 534 P.2d

1258, 1260 quoting the following:

> "The injured party is to be made whole . . . but not to realize a profit."

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Why, then, did this Honorable Court include a profit in its evaluation of the property.

Further, had the feedlots been managed by Larry Stensvad, there is no evidence that any profit would have resulted. As stated by This Honorable Court, in its opinion:

> "There is no reasonable certainty in the record that Stensvad lost profits as the result of the wrong, or that a profit would have been derived at all. [citation]."

As argued by the Bank at page 76 of its initial brief, Larry Stensvad later managed the same assets with the same result he had before: The operation folded at a huge loss.

At minimum, the $183,721 Judgment of This Honorable Court should be reduced by $104,898. To do otherwise is to signal the banking community to sell all collateral on foreclosure immediately without regard to the loss it may

cause the borrower. The Bank here not only received no credit for its appropriate delay of sales until it could obtain a higher price (profit) from the sale of the collateral, but the Bank was actually penalized for the profitable delay - the amount of damages awarded against it was increased by the amount of its profit. Had it taken the easy route and immediately shipped all the cattle to market, it would now be $104,898 better off.

Is this the rule of law This Honorable Court wants to leave for the Banking Community?

(4) Whether Interest Should have Been Denied to the Bank?

(A) Conclusion: The value of the property taken by the Bank did not equal the judgment on Stensvad's Complaint. Further, Stensvad's cross-appeal raised the interest question for the first time on appeal, a question decisive of the case. The Bank should be entitled to interest to date of sale.

(B) Discussion. The Court in its opinion concluded that:

"Once the value of the collateral had been applied to the principal indebtedness through means of foreclosure and other sales, Stensvad's obligation for further interest on those notes to the extent of collection was obviously terminated."

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This conclusion of the Court does not deal with interest up to the date of such sales. That interest should be awarded to the Bank and is easily calculable from the record. Such interest is especially proper if the award of increased value of cattle ($104,898) is allowed to stand. If the cattle are to be valued higher because the Bank kept them for 4 or 5 months during which time they increased in value by $104,898, certainly the Bank should be entitled to interest for the 4 or 5 months it took to earn the extra $104,898.

Again, the signal is being given to the banking community: Sell all assets immediately, regardless of how long it takes to adequately prepare and advertise for sale, as you will receive no interest on your unpaid balances due prior to sale.

The Court in its Opinion decided that:

> "In view of the fact that the Stensvad property taken by the Bank and sold as collateral for the indebtedness due it, exceeded in value as we have above shown the amount of the principal indebtedness, it is improper in this case to award interest to the Bank on the note balances to the date of judgment."

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This conclusion of the Court does not militate against interest from the date of the taking of property to the date of sale.

Further, the Court has overlooked the fact that the amount taken on foreclosure only exceeds the amount of indebtedness because of the presence in the Court calculations of the damages for lost profits and damages for mishandling of business; the Bank claims this is a calculation error on the part of the Court.

The Court should have viewed the matter as follows:

Conversion of personal property	$ 354,111
Conversion of cattle less profits by Bank of $104,898	277,102
Conversion of feedlot & elevators	411,935
	$1,043,148
Less: Court's valuation of Promissory Note principal	$1,022,325
	$ 20,823

That amount of $20,823 represents the excess of property taken as valued by the Court less the amount due on the notes as of November 11, 1975, an amount equal to 2% of the amount due the Bank. In point of fact, the Bank received far less on sale (the fairness of which has been judicially determined in another case) than the Court's valuation, and as noted above, the Bank was short -- by Stipulation of Counsel -- the sum of $374,807.35 after application of the profit on the enterprises made by the Bank. To deny interest (on the $374,807.37) under these circumstances -- without any citation of legal authority or precedent -- is manifestly unfair. The impact of This Honorable Court's decision is as follows:

Shortage after applying all proceeds of sale	$374,807.35
Interest on this amount to date	358,172.06
Damages awarded by This Honorable Court	183,721.00
TOTAL	$916,700.41

As stated in the Bank's Reply Brief, there seems to be confusion between the contract to continue financing (loan money in the future) and the

contracts represented by each existing promissory note (representing money already loaned). Breach by the Bank of the former does not excuse Stensvad's performance of the latter - which are completely separate contracts.

Most compelling, however, is that the Court overlooked Stensvad's cross-appeal and the Bank's argument that Stensvad could not first raise the issue on appeal.

As argued by the Bank in oral argument and by way of reply brief, at p. 57:

> "The most serious problem for Stensvad, however, is Stensvad's failure to raise the issue of the Bank's lack of entitlement to principal and interest prior to appeal. No pleading was filed by Stensvad raising such issues. Nor, was there any argument on the same at trial or in supplemental hearing.
>
> A point not raised by the pleadings will not be considered on appeal. Milne v. Leiphart, 174 P. 2d 805, 119 Mont. 263.
>
> The Supreme Court will consider only such questions as were raised in the Trial Court. Clark v. Worrall,

(5) Whether a bank can protect itself in an on-going enterprise loan by establishing an upper limit to the loan?

(A) Conclusion: The Court overlooked the fact that by Stensvad's own admission an upper limit to the total operating loan was $500,000, and the evidence is unrefuted that this limit was exceeded at the very time the Court holds the Bank in breach for not loaning enough money.

(B) Discussion. The two Stensvad letters, relied on by the Court in establishing the contract with the Bank, both refer many times to an upper limit of $500,000 for his total operating loan. Further, Stensvad admits in both an early deposition and at trial that the Bank never agreed to increase this limit. See discussion in the Bank's Reply Brief, pp. 23-24, 27-28.

The lower court claimed this lending limit was not exceeded at the time of the alleged breach. The only shred of evidence to support such a finding is Exhibit 20 (cited by Stensvad for this proposition). However, as explained in the Bank's Reply Brief (pp. 24-25, A-1, A-2), Exhibit #20 shows on its face that it includes only 3 of the 4 Stensvad corporations, and when

the elevator operating loan is added, the evidence is unrefuted that the lending limit of $500,000 was exceeded at all times after September of 1971. This fact has never been challenged by Stensvad. The evidence on this point is undisputed. Even the figures used by the Court in its opinion make this point clear; the financial statements reviewed at pp. 16-17 show $1,161,530 total debt, and the indebtedness used by the Court for the Bank's set off (November 11, 1971) was $1,022,325. At no time was the fixed asset (non-operating) portion of the loan above $400,000.

How could there be a breach (for failure to loan more money? This question, pivotal to the entire case, was never mentioned in the Court's opinion. Is This Honorable Court suggesting that a Bank cannot rely on a clear upper limit in an on-going operating loan?

WHEREFORE, IT IS RESPECTFULLY SUBMITTED that the Court should reconsider its opinion on breach of contract and liability. At the very least, it should remand the case for further

evidence on this point.

(6) Whether failure to state what the Bank did that constituted a breach will set an intolerable precedent for the lending industry in the State?

(A) Conclusion: By failure to state what the Bank did that constituted a breach, the Court's decision may have an effect on the financial industry in this State that was not contemplated. Banks and other financial institutions may refuse to finance any on-going enterprise for fear that it will be unable to avoid lending more money even when it is not prudent to do so.

(B) Discussion. The Court wisely avoids adopting the lower court's finding that the Bank breached the implied agreement to finance with the October 7, 1971, board resolution. Such a finding is not supportable by any credible evidence -- even Stensvad seems to have changed theories on this point. See Reply Brief, pp. 7-10. This Honorable Court fails, however, to indicate what does constitute the

breach. This omission is significant in view of the reference in the Court's opinion to Stensvad being out of trust, failing to produce financial statements, showing negative net worths, and the detailed critical comments of the bank examiners. These references, without a clear indication of what the Bank did wrong, are bound to have an impact on any member of the financial industry in this State reading the opinion. The safest course, not an uncommon choice among bankers, is not to loan anyone operating money on more than a single transaction.

WHEREFORE, IT IS RESPECTFULLY SUBMITTED the question of breach should be reconsidered, and at the very least, a new evidentiary hearing should be held on remand to establish reliable evidence on the issue of breach.

(7) Whether any breach was waived by the subsequent conduct of the parties?

(A) Conclusion: Whatever breach may have existed was clearly waived by the subsequent agreement acknowledged by Stensvad and

new loans of over $218,000 and new cattle purchases in excess of $100,000, the facts supporting the Bank on this issue cannot be ignored. They are undisputed. Yet the Court failed to address this issue -- an issue absolutely critical to the outcome of the case.

WHEREFORE, IT IS RESPECTFULLY SUBMITTED the opinion of the Court should be reconsidered.

(8) Whether the Court erred in relying on Argument by Stensvad on claimed evidence not in the record and disputed by the Bank?

(A) Conclusion: The Court, in heavily relying on claims of fact by Stensvad's counsel in oral argument, which claims were not in the record, entitled the Bank to an evidentiary hearing on the facts which are material to the Court's decision.

(B) Discussion. Stensvad's counsel, in oral argument, made specific references to the successors in interest to the real property interests and payments to the Bank therefore, over and above the amount of $200,000.00 bid in by the Bank at sale.

Nowhere is this matter in evidence. When Stensvad's counsel phrased his version of the facts without proof or testimony and asked for a stipulation from the Bank counsel, the Bank counsel refused and objected to the admissibility of such evidence. Supplementary Hearing, Transcript, January 23, 1978, at pages 9-12.

At that point, Stensvad's counsel requested the Court's permission to supply evidence to the Court. Ibid., p. 12. That was never done.

It is clear that this Court relied materially upon Stensvad's counsel's oral statement not in evidence as noted in the Court's opinion:

> "At the time of the Sheriff's Sale on foreclosure, the Bank bid in for the feedlot and elevators the sum of $200,000, and was the successful bidder. Later the Bank contracted to sell the feedlots and elevators to Roundup Feeders, Inc., a corporation formed by the owners of the Bank, for $350,000. Roundup Feeders, Inc. in turn leased the properties to a corporation named Faunco, Inc., for cattle feeding operations under the management of Larry Stensvad, which resulted in a payment of $176,731.00 lease payments either to Roundup Feeder's, Inc. or the Bank, the record is not clear."
>
> Supreme Court Opinion, p. 25

It is clear that this Court gave heavy weight to the above financial information not in evidence and attempted to reach an equitable decision based upon it.

If these oral allegations are to be received by the Court as evidence, the Bank should have an opportunity to rebut and explain in an evidentiary hearing.

The Bank makes the following offer of proof of the full true facts:

(1) The true parties in interest will lose over $542,000 plus interest (8 years on $358,336) and operating losses as a result of the Court's decision.

(2) The Bank scheduled an auction sale on June 25, 1972, for sale of all property - rolling stock (vehicles), feedlots, elevators, and real estate. (6 months was a reasonable time to prepare for this sale - notices were sent to every feedlot operator West of the Mississippi River.)

(3) The day before the auction sale, Stensvad's attorney filed a Lis Pendens from

this case on the real estate advertised for sale, which affected the feedlots and elevators.

(4) Because of the Lis Pendens, no one was willing to bid on the real estate at the sale, and no outside party has been willing to purchase the property right up to this day.

(5) The Bank bid in the property at $200,000 at the sale - the only bid received. Subsequently, the Bank sold it to Roundup Cattle Feeders, Inc., a corporation set up by the officers of the Bank for the purpose of operating the feedlot in hopes of selling or leasing the operation as a going concern. As this Court knows, this was a disaster because of declining cattle markets. See Roundup Cattle Feeders, Inc. v. Horpestad, 603 P. 2d 1044 (Dec. 13, 1979, Mont. S. Ct.).

(6) Roundup Cattle Feeders, Inc. (Bank officers) has tried vigorously from the beginning to sell the operation.

(a) In 1975 a contract for purchase was signed with Faunco, Inc. to see the whole operation. Since Larry Stensvad was going to manage the feedlots and elevators for

Faunco, he was willing to and did sign a waiver of the Lis Pendens for that sale only. Faunco defaulted in a little over one year.

(b) Other than the sale proceeds from 2 old elevators ($20,500 total; personal guarantees were made to the title by former Bank officers) and rent on the main elevator of less than the taxes on the same elevator, neither the Bank nor any of its successors in interest have received any income from the properties.

(c) Roundup Cattle Feeders has negotiated a sale of the Melstone Feedlot to Larry Stensvad's brother for $60,000. Larry Stensvad, however, would not sign off on the title, and consequently, no money has been paid pending a final decision in this case. The Hall & Hall appraisal of this property, less rolling stock, is $109,608. The lower court's evaluation, based on claimed cost, was $192,059.

(d) Roundup Cattle Feeders negotiated a sale of the main Roundup elevator (Hall

& Hall appraisal of $99,000) for $40,000, but after the Supreme Court decision, this buyer has backed out.

(7) Therefore, because of the Lis Pendens in this lawsuit filed against the property, property valued at $411,935 by This Honorable Court has not been sold (except for $20,500 worth of old elevators) and has virtually produced no income except $83,500 plus one year's interest paid by Faunco, Inc. and forfeited.

(8) Therefore, because of the Lis Pendens, the Bank and its officers have suffered a loss of interest on $411,935 (using the value found by the Court) for 10 years (at 10%, that is $411,935).

(9) Because of the Lis Pendens, the property could not be sold, and with the abandonment of the Milwaukee Railroad, the elevators on Milwaukee siding and the feedlots are worth only a fraction of the original appraised value.

Reasonable expectation: Old elevators & Melstone Feedlot		$ 80,500
Roundup elevator		40,000
Roundup Feedlot	(or less)	140,000
TOTAL		$260,500

(10) The former bank officers were required to guarantee the whole indebtedness when they sold their interest in the Bank. They have already paid out of their pockets $618,636.90 to pay off the debts and pay the Bank for the properties. They can realistically expect to recover $260,500 for the properties, leaving a net loss of $358,336.90 before payment oif the Judgment of $183,721, to a grand total loss of $542,057.90, plus interest, on their outlays and operating losses of Roundup Cattle Feeders.

It is submitted that the Bank is entitled to an evidentiary hearing on this matter.

RESPECTFULLY SUBMITTED this 14th day of January, 1982.

TOWE, BALL, ENRIGHT & MACKEY
2525 Sixth Avenue North
Billings, Montana 59101

By Thomas E. Towe
THOMAS E. TOWE
Counsel for Defendants

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I did, on this 14th day of January, 1982, serve the within Petition

for Rehearing upon Plaintiffs by depositing a true copy thereof in a sealed envelope bearing United States postage thereon fully prepaid, in the United States Post Office at Billings, Montana, addressed as follows:

MR. KENNETH TOLLIVER
Attorney at Law
P. O. Box 1977
Billings, Montana 59103

this being the last known address of counsel for Plaintiff.

TOWE, BALL, ENRIGHT & MACKEY
2525 Sixth Avenue North
Billings, Montana 59101

By Thomas E. Towe
THOMAS E. TOWE
Counsel for Defendants

IN THE SUPREME COURT

OF THE STATE OF MONTANA

L. D. STENSVAD, personally and as representative of the investing shareholders of AGRI-SERVICES, INC., M.V. ENTERPRISES, INC., M & S CATTLE FEEDERS, and L. D. STENSVAD CATTLE CO., all Montana Corporations, Plaintiffs, -vs- THE MINERS AND MERCHANTS BANK OF ROUNDUP, MONTANA, Defendants.	Case No. 80-210 CROSS PETITION AND RESPONSE TO PETITION FOR REHEARING Filed 1/18/82

SUMMARY OF STENSVADS POSITION

STENSVAD does not actively seek rehearing in this case. However, if this Honorable Court determines to rehear this appeal we request that Stensvad be allowed rehearing on the issue of lost profits.

First, Stensvad will set forth the basis of the request for rehearing on lost profits and

then respond to each item in the Bank's petition for rehearing.

I. CROSS PETITION FOR REHEARING ON LOST PROFITS:

Stensvad seeks a rehearing on the issue of lost profits because the evidence at trial fairly supports the trial courts findings.

We do not ignore, nor did the trial court ignore the many contentions made by the Bank concerning the financial weakness of rhe Stensvad business. However, the arguments made by the Bank distort the true capacity of the businesses to continue absent the Bank's breach because:

--the financial statements do not present a true picture of the strength of the businesses. Liabilities include the obligation of the investor's for feed expense which had been directly to the investors by the Bank and then were loaned directly to Stensvad at the request and for the convenience of the Bank. This liability distorts substantially the ratios of the companies. Further, there is no entry in any of the financial statements reflecting

the investor's obligation to pay Stensvad for the feeding accrued to date, since the feed bill for the animals was not calculated by the companies until the sale of the fat animal.

It was never within the contemplation of the parties that Stensvad had the financial strength to feed out 15,000 head of investor cattle. The Court should not properly fault Stensvad because he did not have such financial capacity.

--There is sufficient evidence in the record to establish a history of profitability in the company. At pretrial Stensvad established, and the parties stipulated that the actual cash cost of the facilities exceeded $814,000. Much of this cost, particularly construction labor, was expensed rather than capitalized during the fiscal period ending June 1971. Thus, the difference between cost per books and cost per cash account shows that the companies earned a positive cash flow which was used to expand capital facilities. The same demonstration can be made by comparing the liquidation value

of the personal property, the cost of the facilities, and the debt, which shows that the companies had, on a cash basis, earned over $300,000 which was invested in hard assets to expand the business in reliance on the Bank's 1970 agreement to provide long term fixed asset financing, operating financing, and financing for investors.

--Further, the record shows that the PCA was ready and able to finance feed for the investor cattle at the time the Bank breached. Upon transition to this form of financing, the companies' balance sheets would be shed of the investor feed liability and the ratios would have been strong and bankable.

For these reasons, Stensvad would request the opportunity to reargue the issue of lost profits, if the Court determines to rehear this case.

II. RESPONSE TO THE BANK'S PETITION FOR REHEARING

A response is made separately to each of the issues raised by the Bank.

1. Whether real estate can be the subject of conversion is irrelevant to this action.

The action was predicated on the theory of breach of contract. The measure of contract damages should be applied. The question is properly treated by the Court in its decision.

2. The Bank's claim of res judicata is without merit.

This action was brought, not by the corporations, but by Larry Stensvad personally. There is no identity of interest between this action and the actions which the Bank assert as being res judicata.

The records of the District Court at Roundup, Montana, disclose that each of the claimed res judicata actions were completed after the Bank had taken control of the corporations which held title to these properties and installed their own board of directors. It is contrary to the policy of the doctrine of res judicata to determine a suit between true adverse parties by reason of the result of a case between friendly litigants. The

doctrine of res judicata is not raised by the facts of this case since there is no identity of interest, since the cases asserted by the Bank were filed after this action, and since the cases were concluded at a time when the Bank had control of all of the parties involved in the cases.

3. The Court properly allowed Stensvad credit for the full sale price of the cattle.

Given that the trial Court found that the Bank breached its agreement to finance the business activities of the Plaintiff, wrongfully took possession of the assets, and thereafter operated them, it is preposterous to argue that the Bank should be allowed to benefit from its wrong. Here the Bank realized sums of cash from the sale of Stensvad property. Although the Bank brags that "it made a profit", it did so with wrongfully seized cattle, feed equipment, and feed inventories. Properly these sums should be delivered to Stensvad.

Also to be considered is the true nature

of the Bank's post breach actions. The Bank appears before this Honorable Court pretending that it simply proceeded to liquidate collateral in the most commercially reasonable manner. But in the fall of 1971 the Bank sought not to liquidate the assets but to accomplish a forced "take over" of the on going business. After the Bank terminated performance with Stensvad it offered to continue performance to the PCA, simply replacing Stensvad. The Bank took over the companies and elected Boards of Directors. Only because the other participants refused to do business with the Bank was it unable to seize and operate Stensvad's companies. The Bank is asking this Honorable Court to ignore the trial Court's finding of breach, and give the Bank the full benefit of it wrongful acts.

4. Interest was properly denied to the Bank.

The Bank incorrectly argues that the question of award of interest was raised for the first time on appeal. The issue was raised,

argued, and treated by the trial Court. The trial Court allowed the Bank to file a post trial accounting rather than formal pleadings concerning the Bank's claim of set off. (The Bank chose to not even file an answer to the amended complaint and was allowed to set forth a denial on the day of trial). Since the Bank was allowed to advance its claim without formal pleadings, it can hardly complain that no formal pleadings were filed in response to its non-existent pleadings. In fact, at the time of the original trial in this action, the Bank was unable to prepare a statement of its claim for the amounts which were due. As a result, the Trial Court accommodated the Bank and allowed the Bank to prepare a statement of its claim at a subsequent hearing. Although the Bank never filed formal pleadings, the issue of interest was briefed by counsel at the Trial Court level and discussed by the Trial Court in its opinion.

The decision of the Supreme Court to deny interest to the Bank is proper on the merits.

Having breached its agreement, the Bank should not be allowed to obtain the benefit from it. The damages to Stensvad caused by the Bank's wrong exceed the amount of the Bank's claim and are subject to set-off. Both the Trial Court and this honorable Court found the Bank's agreement to provide prospective financing to be a single indivisable agreement. The Bank's claim that the Court should view each Promissory Note as a separate agreement is contrary to the evidence in this case concerning the course of the dealings between the parties for many years, the nature of the financing, and the express agreement between the parties.

5. The Bank's upper limit argument is a willful distortion of the facts, was rejected by the trial Court, this Honorable Court, and does not constitute grounds for rehearing.

Throughout this case the Bank has contended that the limit on operating capital which was agreed would apply after the transition to the PCA feed financing program could be applied by the Bank even though there were thousands

of investor cattle in the feedlot for which feed was to be financed by the Bank in completion of performance by the Bank as its June 1971 agreement. This contention was strongly urged at the trial level. It was rejected. It does not meet the grounds required for rehearing. If the Court allows rehearing on this issue, a detailed analysis of the evidence will show that the contention is false, but even if true, the loans for operating capital were less than $500,000 on October 7, 1971.

6. The Bank's argument that the Court's ruling establishes an improper precedent for the banking industry is without merit.

The decision of the Honorable Court establishes no new principal of law which will effect the banking industry. The Court's opinion sets forth that the Bank breached its agreement and is subject to the law of contracts, nothing more.

The Bank advances no case or matter of material fact which would justify rehearing. It is worth noting however, that the Bank's

repeated contentions concerning Stensvad being "out of trust" were supported by no creditable evidence at trial and that the Bank fought successfully to foreclose any exposition of the investors situation. Also of interest is the fact that the impact of carrying the investor's feed liability on the financial statements of the Stensvad companies was well known to the Bank in June of 1971 when Ed Towe obtained Stensvad's agreement to withdraw from the formation of a new bank in Roundup in exchange for the Bank's promise to continue to provide the financing for the business. Can situations known to the parties to exist at the time of formation of a contract later be claimed as justification for its unilateral termination without notice?

7. There was no waiver of the Bank's breach.

Fairly construed, the evidence on this point shows that the Bank was able to obtain Stensvad's signature on additional documents to assist the Bank in his ruination, by making

additional promises of performance which the Bank did not honor. The Bank purchased additional cattle only for the purpose of furthering its effort to oust Stensvad and continue the operation of the business for its own account. It did not resume performance of its agreement at any time after October 7, 1971.

8. The contentions set forth in part (8) of the Bank's brief in support of its Petition for Rehearing do not support a decision either to rehear this appeal or remand for additional evidence.

During the course of the post trial accountings Stensvad's counsel obtained from the present owners of the Bank evidence that the Bank had received $176,731 from the Bank's deal with Faunco and requested the Bank's officers (Mr. Towe) to simply set forth all the monies which had been received from this type of activity. Mr. Towe objected that such evidence was irrelevant and persisted in his refusal to produce it as part of the accounting process. Now, after the accounting, after appeal, he requests

an evidentiary hearing to show what he previously refused to disclose. This is patently improper. But if the Court desires to hear what the ultimate impact of this case has been on the true parties in interest in this case, we would welcome the opportunity to show the Court the financial and personal impact upon Larry Stensvad of having destroyed the results of many years devoted to building his cattle feeding business, his reputation as a member of the business community of Roundup, and his personal financial security.

III. CONCLUSION:

The decision rendered by this Honorable Court, fairly viewed, represents a just resolution of a factually complex case. We submit that all parties would be served by finally ending this long case, but if it is to continue, request an opportunity to be heard on the issue of lost profits.

RESPECTFULLY SUBMITTED this 16th day of January, 1982.

Wright, Tolliver,
Guthals, Prater and
LeRoy
P. O. Box 1977
Billings, Montana 59101

K. D. Tolliver
by Kenneth D. Tolliver
Counsel to Plaintiffs.

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I did, on this 16th day of January, 1982, serve a copy of the within document upon the defendants by depositing a true copy thereof in a sealed envelope bearing United States postage thereon fully prepaid, in the United States Post Office at Billings, Montana, addressed to Counsel for the Defendants.

K. D. Tolliver
Kenneth D. Tolliver

IN THE SUPREME COURT

OF THE STATE OF MONTANA

L. D. STENSVAD, personally and as representative of the investing shareholders of AGRI-SERVICES, INC., M. V. ENTERPRISES, INC., M. & S. CATTLE FEEDERS, and L. D. STENSVAD CATTLE CO., all Montana corporations, Plaintiffs, vs. THE MINERS AND MERCHANTS BANK OF ROUNDUP, MONTANA, Defendants.	Filed 1/27/82 No. 80210 RESPONSE TO CROSS-PETITION

1. Lost Profits. Respondent Stensvad apparently has cross-petitioned for reconsideration of the lost profits issue.

Stensvad's very cross-petition demonstrates the lack of content to his lost profits issue in admitting that it was never within his contemplation that he had the

financial strength to feed out 15,000 head of cattle; the lack of financial ability to do so was also the lack of financial ability to regularly pay off notes due or additional amounts he wished to borrow.

His failure to acknowledge the significant indebtedness to the California investors is, however, inconsistent with his second amended complaint where he asked for damages for investor's equities of $343,680.91. Acknowledging such a debt in his pleadings is significant.

The court's opinion adequately demonstrated the severe financial circumstances of the corporations. The Court correctly held Stensvad's claim to lost profits is too speculative.

2. Conversion of Real Estate. Respondent's first response to the conversion of real estate issue appears in his petition.

It is not correct, as claimed, that Stensvad's action was predicated solely on breach

of contract. The second claim of Stensvad's second amended complaint is specifically stated as a conversion claim.

Likewise, the district court specifically awarded damages for the "value of the property taken by the bank from the plaintiffs." [Finding F(12)]

Therefore, the District Court awarded damages for conversion, which this Court has sanctioned, contrary to the principle of law that conversion of realty does not exist. Such a taking is a deprivation of property without due process of law under the Montana and U.S. Constitutions.

3. Res Judicata. Stensvad again makes claims either not in the record or contrary to the record in claiming that the judgments claimed to be res judicata were "friendly" suits.

The court's attention is directed to the appendix at page 45 of the bank's initial brief wherein the order of the court autho-

rizing sale of collateral states:

> " . . . the matter came regularly for hearing before this court on the 24th day of March, 1972, with both parties appearing through counsel . . . " (emphasis supplied)

Stensvad and the corporation were represented by their own counsel, contrary to his assertions now.

In any event, notice of the taking of possession of the M&S Cattle Feeders feed lot and the entire operation was sent by the bank and received by L. D. Stensvad on November 19, 1971. [Requests for Admission No. 23, p. 4; No. 15, p. 7, deemed admitted by written court order].

All of the proper notices were sent by the bank to Stensvad. [Judicial Notice, Hearing on Motion, March 24, 1972, Banks v. Agri-Services, No 7054]. He either appeared or chose not to appear in each case.

Therefore, Stensvad still fails to show why Res Judicata does not apply. Such a taking is a deprivation of property without

due process of law under the Montana and U. S. Constitutions.

4. Interest. In his Petition, Stensvad claims the issue of interest was briefed by counsel at the Trial Court level.

The briefs by Stensvad at the District Court level and all hearings at the District Court level make no reference to any Stensvad argument as to the propriety of the Bank obtaining interest on the loans.

The interest argument first surfaces on appeal in Stensvad's answer brief where he argued and now argues that the promissory notes should be treated as a single indivisible agreement.

It is submitted that this Honorable Court overlooked the bank's argument at p. 61 of its reply brief, the first time it could respond to Stensvad's cross-appeal on the interest question.

The promissory notes sued upon were for money lent, and as to those notes, the bank

had no further obligation of performance, and no breach as to them by the bank existed. Those notes sued upon were entirely separate and severable as to the obligation of Stensvad to pay and were not interdependent and common to the claimed agreement to loan money, and accordingly, the contracts of prior loans and a claimed contract to loan money in the future are severable and not entire. See pp. 61-62 of the bank's reply brief for citations of authority. Even assuming the Bank breached a contract to loan more money, that doesn't relieve Stensvad from paying back the money he had already borrowed.

5. Upper Limit on Operating Capital.

Stensvad incorrectly claims that the loans for operating capital were less than $500,000 on October 17, 1971.

This simply is not supported by the evidence:

1. Larry Stensvad's letter of September 16, 1971 admits that the total operat-

ing capital loan was $502,000. [bank initial brief, appendix, page 27].

2. Stensvad's claim that it was thereafter reduced fails to include in computations the $114,000 in operating loans to Agri-Services, Inc. On September 30, 1971 there was $554,000 in operating loans. [bank reply brief, pp. 24-25 and appendix A-1 to A-7].

3. On the date of the claimed breach there were $555, 707.45 in operating capital loans. [id., p. 24]. Furthermore, Stensvad admitted that at no time did the bank agree in advance to loan in excess of their limit of $500,000:

> "Q. [Neely]. The bank did not agree to up any limit of $500,000 did it?
>
> A. [Stensvad] They did not agree to that, no . . . ." Cross, Larry Stensvad, p. 646, Trial Transcript.

The evidence is incontradicted on this point; the decision of the Lower Court and of This Honorable Court is out of touch with

reality on this point.

6. Waiver.

Stensvad makes the incredible claim that the bank purchased additional cattle to further its own efforts. The bank never purchased any cattle and the record is devoid of any such evidence. Stensvad purchased over $100,000.00 worth of additional cattle after the alleged breach and the Bank loaned him money to pay for them. A clearer case of novation is hard to imagine - there are no disputed facts.

7. Receipt of Funds by Bank.

At pages 7-8 of Stensvad's cross-petition, newly claimed evidence not in the record is again advanced to support his argument. Stensvad falsely claims that counsel for the bank refused to produce evidence on monies received by the bank. This is simply untrue.

In fact, Stensvad's counsel requested a stipulation, and that requested stipulation, not agreed to, became a dominant part of this

court's opinion.

Counsel for the bank merely refused to stipulate to the figures involved, with Stensvad's counsel agreeing to provide the information at a later date and not so doing:

> "Mr. Tolliver: . . . All I'm asking you to stipulate is to what the fact is, so that we can get it out of the way.
>
> Mr. Towe: If you want me to go through the facts and present you with what happened on that matter, I'd like to review the contracts and get the qualifications that subsequently appeared. . . . .
>
> Mr. Tolliver: Since the defendant has declined to stipulate as to the amount, your honor, I request the court's permission to supply the court with an affidavit showing the contract and the amount.
>
> . . .
>
> "Mr. Tolliver: With regard to that, since the bank has refused to stipulate as to the amount its records show was received, I would request the court's permission to supply at a date later than this hearing an affidavit from the president of the bank showing amounts received.
>
> . . .
>
> Mr. Towe: . . . If you want to present the amounts we can perhaps

stipulate to the amounts and I can still reserve my objection on relevancy."

pp. 11-12, Supplementary Hearing of January 22, 1978.

Refusal to stipulate and a request to review the evidence does not constitute evidence. Bank's counsel clearly wished to verify facts, and it wasn't submitted by Stensvad because the proposed evidence was incorrect.

8. Conclusion.

Wherefore, it is urged that this court reconsider the decision of the court, reducing the Stensvad damages as requested and increasing the bank's interest as requested, or in the alternative providing a hearing on the new matters raised by Stensvad in oral argument which are not in evidence, namely the issue of ultimate gains or losses to stockholders and third parties.

RESPECTFULLY SUBMITTED this 26th day of January, 1982.

TOWE, BALL, ENRIGHT & MACKEY
2525 Sixth Avenue North
Billings, Montana 59101

By: _____
THOMAS E. TOWE
Counsel for Defendants.

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I did, on this 26th day of January, 1982, serve the within RESPONSE TO CROSS-PETITION upon Plaintiffs by depositing a true copy thereof in a sealed envelope bearing United States postage thereon full prepaid, in the United States Post Office at Billings, Montana, addressed as follows:

M[illegible]. KENNETH TOLLIVER
Attorney at Law
P. O. Box 1977
Billings, Montana 59103

this being the last known address of counsel for Plaintiff.

TOWE, BALL, ENRIGHT & MACKEY
2525 Sixth Avenue North
Billings, Montana 59101

By: _____
THOMAS E. TOWE
Counsel for Defendants

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 80-210 Filed 2/26/82

L. D. STENSVAD, personally and as representative of the investing shareholders of AGRI-SERVICES, INC., M. V. ENTERPRISES, INC., M. & S. CATTLE FEEDERS, and L. D. STENSVAD CATTLE CO., all Montana Corporations,

Plaintiffs,

vs.

THE MINERS AND MERCHANTS BANK OF ROUNDUP, MONTANA,

Defendants.

ORDER DENYING PETITION FOR REHEARING

We deny petition of defendant bank for rehearing of our opinion entered January 7, 1982 with the following comments:

1. Petitioner bank contended it is entitled to a set-off for interest accrued on

the principal indebtedness on the notes from the date of breach until the monies received on foreclosures by the bank were applied on the notes. We so indicated in our opinion. However, we carefully searched the record to determine the applicable amounts and dates, and were unable to identify either in any case. This Court is bound by the record before us. Therefore, we held that the set-off would be the amount of principal indebtedness as of the date of the breach on facts found by the District Court.

2. Petitioner contends respondent is not entitled to the benefit of the profit realized by the bank after it had taken possession of the cattle and eventually sold the same. We do not agree, but point out that it we did, it would result in a higher judgment against the bank in the amount of the profit.

3. Petitioner contends that its foreclosure of the properties has been hampered by lis pendens filed by Stensvad. We have

no record of that before us, but in any event, Stensvad, we assume, must dismiss any lis pendens which relate to issues settled in this appeal upon payment of judgment by respondent.

According, the petition for rehearing is denied.

DATED this 25th day of February, 1982.

/s/ Frank I. Haswell
Chief Justice

/s/ Gene B. Daly

/s/ Frank R. Morrison, Jr.

/s/ John C. Sheehy

/s/ Fred J. Weber
Justices

IN THE SUPREME COURT

OF THE STATE OF MONTANA

Filed
3/10/82

L. D. STENSVAD, personally and as representative of the investing shareholders of AGRI-SERVICES, INC., M.V. ENTERPRISES, INC., M. & S. CATTLE FEEDERS, and L. D. STENSVAD CATTLE CO., all Montana corporations, Plaintiffs, vs. THE MINERS AND MERCHANTS BANK OF ROUNDUP, MONTANA, Defendants.	No. 80-210 PETITION FOR SUPERVISION OR CORRECTION OF REMITTUR.

Defendant MINERS AND MERCHANTS BANK petitions the Court to supervise, or in the alternative, to take supervisory control of the above-entitled case pursuant to Rule 17 of the Montana Rules of Appellate Civil Procedure and M.C.A. §3-2-202 through §3-2-204, wherein this Court has the power of appellate

jurisdiction over all cases and the power to modify its own order, and to prevent manifest injustice.

On February 25, 1982, this Court issued its Order denying Petition for Rehearing in the above-entitled cause, and thereupon the Clerk of this Court issued Remittur, a copy of same being attached hereto, wherein it is contended two errors occur which cause an unjust result and deserve remedy:

1. Mathematical Error.

This Court apparently believes that it awarded the Bank the benefit of profits on the sale of cattle or that the award in the suit was structured so that the Bank benefited from the award or would suffer detriment if the Bank's position were accepted:

> "Petitioner contends respondent is not entitled to the benefit of the profit realized by the Bank after it had taken possession of the cattle and eventually sold the same. We do not agree, but point out that if we did, it would result in a higher judgment against the Bank in the

amount of the profit."

2/25/82 Order

This Court's award in the opinion of January 7, 1982, however awarded as follows:

A. Award to Stensvad (p. 23 and 27 of Opinion)

1. Conversion of cattle

a) Conversion of cattle	$277,102.27
b) Profit made by Bank on sale of cattle	104,897.73
	$382,000.00
2. Other damages	824,046.00
Total to Stensvad	$1,206,046.00

B. Offset to Bank (p. 23 and 27 of Opinion)

1. Amount due Bank on November 11, 1971, prior to sale of cattle	$1,022,325.00
Net to Stensvad	$ 183,721.00

It is submitted the Court has erred mathematically. To award Stensvad the profits of $104,897.73 increased the award to Stensvad

and increased his net award. To not so award the profits would decrease the award to Stensvad and his net award and would not result in a higher judgment against the Bank, but one of $78,823.27, the sum of $183,721 minus $104,897.73.

2. Error As To Contents of Record.

The Court in its Order of February 25, 1982, acknowledges that the Bank is entitled to interest from breach until sale of assets but was unable to find the applicable amounts and dates.

However, the amount of interest from November 18, 1981, on the balance of $1,010,215.80 on that date -- seven days after the claimed breach of November 11, 1971, and a balance of $1,022,325.00 (p. 27, Opinion) -- was on this lower balance after application of all proceeds of sale and expenses equal to $35,962.93.

This amount of interest was proposed as a stipulation by opposing counsel and

stipulated to by both counsel, set forth as a stipulation in oral argument, at p. 53 of the Bank's Reply Brief, and at p. 54 of the Bank's initial brief, and is set forth here in its entirety from p. 4-6 of the January 22, 1979, Supplemental Hearing herein:

" January 22, 1979
2:30 P.M.

THE COURT: All right, you may proceed. How do How do you want to do this, do you want to put your stipulations into the record first?

MR. TOLLIVER: I guess, Your Honor. Let the record show that the Plaintiff offers to stipulate that the balance of the loans between the Plaintiffs and the Defendants on or about November 18, 1971, was the amount of $1,010,215.80
Do you want to stipulate to that?

MR. TOWE: We will so stipulate.

MR. TOLLIVER: Let the record further show that the balance remaining on such promissory notes without regard to accrued interest on or about June 10, 1972, was the amount of $374,807.35, and that in arriving at that balance credit was given against the loans from the sale of all of the personal property assets of the Plaintiffs from the sale of the feed lot and elevator at Roundup and that prior to these credits being given the Bank charged against the obligation of the Plaintiffs expenses which the Bank incurred while operating the feed lot

to feed out the cattle prior to sale, and expenses incurred in conducting the sale of certain items of personal property on June 10, 1972.

Let the record further reflect that had interest been accrued on these obligations, the interest to June 10, 1972, would be $35,962.93 accrued interest.

Do you desire to stipulate to that?

MR. TOWE: Your Honor, we will stipulate as far as that goes. Are you going to stipulate as to the amounts of the proceeds actually applied against the loans?

MR. TOLLIVER: Yes.

MR. TOWE: You are coming to that. Okay. We will stipulate as to what has been said so far.

MR. TOLLIVER: Let the record further reflect, Your Honor, that in liquidating the assets of the Plaintiffs, the Bank received from sale of fat cattle and Mexican roping steers the sum of $520,000.00, and that fromfrom the sale of equipment and rolling stock at auction, the sum of $66,064.70; that prior to such sale the Bank received from leases of elevator facilities the sum of $912.60, and that the Bank bid at the sale for the feed lot and elevator at Roundup the sum of $200,000.00.

Let me add to that that in addition certain items of other personal property were sold, which will be subject to later stipulation. I will offer to stipulate to the foregoing.

MR. TOWE: And that those sums all were applied against those loans to arrive at the $374,000 figure.

MR. TOLLIVER: Yes, the foregoing sums were assigned.

(At this time there was discussion off the record.)

MR. TOLLIVER: Stipulated. Let the record further reflect that the records of the Bank indicate that the Bank earned a net profit by operating the feed lot from November, 1971, until the date that such operation ceased in the spring of 1972, from feeding cattle, in an amount of $104,899.73, which amount represents an increase in the total proceeds received by the Bank over the proceeds that would have been received had the cattle been sold in November of 1971, after payment of all expenses.

MR. TOWE: And that that amount was applied to the debts.

MR. TOLLIVER: And that such proceeds were applied to the debts.

MR. TOWE: I will stipulate to that."

P. 4-6, Transcript

It is submitted that the amount of interest due the Bank is calculable.

DATED this _____ day of March, 1982.

THOMAS E. TOWE
Attorney for Appellant-Petitioner
Miners & Merchants Bank

2525 6th Avenue North
Billings, Montana 59101

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I did, on this _____ day of March, 1982, serve the within Petition for Supervision or Correction of Remittur upon Plaintiffs by depositing a true copy thereof in a sealed envelope bearing United States postage thereon fully prepaid, in the United States Post Office at Billings, Montana, addressed as follows:

MR. KENNETH TOLLIVER
Attorney at Law
P.O. Box 1977
Billings, Montana 59103

this being the last known address of counsel for Plaintiff.

TOWE, BALL, ENRIGHT & MACKEY
2525 6th Avenue North
Billings, Montana 59101

By: /s/ Thomas E. Towe
Thomas E. Towe
Counsel for Defendant

IN THE SUPREME COURT

OF THE STATE OF MONTANA

L. D. STENSVAD, personally and as representative of the investing shareholders of AGRI-SERVICES, INC., M.V. ENTERPRISES, INC., M. & S. CATTLE FEEDERS, and L. D. STENSVAD CATTLE CO., all Montana corporations, Plaintiffs, vs. THE MINERS AND MERCHANTS BANK OF ROUNDUP, MONTANA, Defendants.	Filed 3/19/82 No. 80-210 MEMORANDUM IN OPPOSITION TO PETITION FOR SUPERVISION OR CORRECTION OF REMITTITUR

On January 7, 1982, this honorable Court issued its opinion in this case directing the District Court to enter a judgment in favor of the Plaintiff (Stensvad) in the amount of $183,721, with interest thereon from the date of entry after remittitur.

The Appellant (Bank) petitioned for rehearing, which petition was denied on February 25, 1982. Subsequently, the Bank filed an additional petition. The Court has orderd Stensvad to respond to this latest petition within ten days.

In response, Stensvad feels that the Bank's petition is in reality a Second Petition for Rehearing rehashing issues already resolved, rather than a petition seeking the correction of remittitur. As such, the petition should be denied summarily.

I. JURISDICTION OF THE SUPREME COURT

Stensvad agrees that this Court has ample jurisdiction to correct any mistakes, oversights, or omissions which might arise in its judgments. However, as more fully explained below, this honorable Court has made no mistakes, oversights or omissions in the course of these proceedings. The remittitur is consistent with this Court's original opinion, and with this Court's order denying

the Petition for Rehearing. The remittitur to the District Court contains the proper provisions required by the Rules of Appellant Civil Procedure and needs no correction. Therefore, the petition of the Bank falls outside this Court's decision in Sun River Cattle Company v. Miners Bank of Montana, 525P.2d 19(1974), which is concerned with a remittitur which did not comply with procedural requirements.

II. THIS COURT'S REMITTITUR IS CORRECT

A. There is no Mathematical Error.

The Bank labels its first argument in terms of this Court's supposed mistakes in mathematical calculations. Of course, as the Bank well knows, as well as anyone else who can add or subtract, those calculations are accurate. Really, the Bank is arguing with this Court's methodology in arriving at the judgment -- a subject which cannot be raised at this point in the proceedings. In any event, this writer submits that the

Court was perfectly correct in not only its mathematics but its methodology and theory.

The very stipulation of fact which the Bank cites in its argument shows that the actual sale proceeds for fat cattle amounted to $520,000.00. Rather than award the Plaintiff those full sale proceeds, the District Court awarded $277,102.27, plus $104,987.73, for a total of $382,000.00. The award was made in this manner because of the unusual practices engaged in by the Bank in accounting for its activities after it seized possession of the Stensvad assets. The records maintained by the Bank were denominated at the trial as "linestands". The Bank charged to these linestands numerous items of expense which it claimed it incurred in the operation of the feedlots. After taking into account all of these charges, the Bank claimed that it earned a "profit" of $104,000.00. Stensvad claimed that many of the charges were questionable. However, the District Court adopted

a manner of calculation most favorable to the Bank in accepting this "profit" figure by reducing the stipulated sales proceeds. The District Court thus also avoided dealing with a very complicated and bewildering presentation by the Bank concerning its operation of the feedlots.

As this Court correctly pointed out in the February 25, 1982, order denying the Petition for Rehearing, had the District Court simply awarded Stensvad the value of the cattle sold plus the value of the feed on hand used by the bank, the award to Stensvad would have been significantly larger.

B. <u>There is No Error as to the Contents of the Record</u>.

The Bank contends that there was sufficient evidence in the record to allow this Court to award the Bank interest. This Court found otherwise, and its finding is absolutely correct.

The Bank argues that the stipulations

reached by the parties are stipulations as to the amount of interest which would have accrued on the promissory notes between Stensvad and the Bank after the Bank had credited to the notes the proceeds from the sale of the Stensvad assets. Such is not the case. The linestands prepared by the Bank contain much extraneous information. Reference to this extraneous information is contained in the stipulations now advanced by the Bank.

> "MR TOLLIVER: Let the record further show that the balance remaining on such promissory notes without regard to the accrued interest on or about June 10, 1982, was the amount of $374,807.35, and that in arriving at the balance, credit was given against the loans from the sale of all of the personal property assets of the Plaintiffs from the sale of feedlots and elevator at Roundup and that prior to these credits being given the Bank charged against the obligation of the Plaintiffs expenses which the Bank incurred while operating the feedlot to feed out the cattle prior to sale, and expenses incurred in conducting the sale of certain items of personal property on June 10, 1972. (Emphasis supplied.)
>
> Let the record further reflect that had interest been accrued on these obligations, the interest to June 10, 1982, would be $35,962.93 accrued interest.

Do you stipulate to that?

MR. TOWE: Your Honor, we will stipulate as far as that goes. Are you going to stipulate as to the amounts of the proceeds actually applied against the loans?"

The purpose of the stipulation was only to summarize the contents of the linestands. The stipulation does not purport to reflect the amount which would have been due on the promissory notes themselves. The linestands include many charges in addition to the the promissory notes, including attorneys fees incurred by the Bank during its wrongful seizure and operation of the Stensvad assets.

Therefore, this honorable Court was exactly correct when it noted that the Bank failed to furnish evidence showing the principal indebtedness on the notes after the application of proceeds from the sale of Stensvad assets.

Even though the Bank was given a grant of additional time by the District Court in order to properly furnish such information, it was not forthcoming. To this date, the

Bank has not accounted for many of the proceeds which it received from post foreclosure operation of these assets and has refused to do so. Having elected to not make a proper accounting at trial, the Bank now complains that the Supreme Court refuses to interpolate such an accounting after appeal. Under these circumstances, the Bank is clearly not entitled to relief.

III. CONCLUSION

The Bank's Petition for Supervision or Correction of Remittitur is nothing more than a second Petition for Rehearing, and should be denied on that basis alone. Further, the grounds advanced to justify this second Petition for Rehearing in themselves are incorrect and were properly ruled upon this this honorable Court on the first Petition for Rehearing.

DATED this 16 day of March, 1982.

WRIGHT, TOLLIVER, GUTHALS,
PRATER & LEROY, P.C.

By_____
Kenneth D. Tolliver
Attorney for Plaintiff
L. D. Stensvad

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I did, on this 16th day of March, 1982, serve the within Memorandum in Opposition to Petition for Supervision or Correction of Remittitur by depositing a true copy thereof in a sealed envelope bearing United States postage thereon fully prepaid, in the United States Post Office, at Billings, Montana, addressed as follows:

Gerald J. Neely
Attorney at Law
2525 6th Avenue North
P. O. Box 21137
Billings, MT 59104

this being the last known address of counsel for Appellant.

WRIGHT, TOLLIVER, GUTHALS,
PRATER, & LEROY, P.C.
P. O. Box 1977
Billings, MT 59103

By /s/ Vicky L. Roda

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 80-210

Filed 3/25/82

L. D. STENSVAD, personally and as representative of the investing shareholders of AGRI-SERVICES, INC., M. V. ENTERPRISES, INC., M.& S. CATTLE FEEDERS, and L. D. STENSVAD CATTLE CO., all Montana corporations,

Plaintiffs,

vs.

THE MINERS AND MERCHANTS BANK OF ROUNDUP, MONTANA,

Defendants.

ORDER DENYING PETITION

Opinion on the cause was filed and entered January 7, 1982. Appellant bank petitioned for rehearing, which was denied by our order

of February 25, 1982. Appellant bank subsequently on March 10, 1982 filed its Petition for Supervision or Correction of Remittitur.

While it is true that this Court has jurisdiction to correct its remittitur in any cause, Sun River Cattle Co. v Miners' Bank of Montana (1974), 164 Mont. 479, 525 P.2d 19, such procedure is reserved to the correction of manifest errors. It may not be used to obtain in effect a second rehearing on an opinion handed down in any cause.

Petitioner moves on two grounds, (1) that the Court made a mathematical error in including the profit figure of $104,897.73 on the sale of cattle after foreclosure; and (2) the Court erred as to the contents of the record in this cause regarding a stipulation as to accrued interest on the obligations Stensvad owed to the bank in the amount of $35,962.93.

The intention of the majority to include

the profit on the sale of cattle as part of Stensvad's recovery is clear. The inclusion of profit is one of the items to which the dissenting justice objected, but the majority ruled otherwise. Therefore, there is no mathematical error in the calculation contained in the opinion, based on the majority decision.

Regarding the second ground, appellant disagrees that the accrued interest figure referred to applies to the indebtedness owed the bank on Stensvad's notes. As we indicated in the order denying rehearing, we cannot substantiate in the record which party is correct on this item.

The Petition for Supervision or Correction of Remittitur is accordingly denied.

DATED this 25th day of March, 1982.

/s/ Frank I. Haswell
Chief Justice

/s/ Gene B. Daly

/s/ Frank R. Morrison, Jr.

/s/ John C. Sheehy
Justices

IN THE DISTRICT COURT OF THE FOURTEENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF MUSSELSHELL

L. D. STENSVAD, personally and as representative of the investing shareholders of AGRI-SERVICES, INC., M. F. ENTERPRISES, INC., M & S CATTLE FEEDERS, and L. D. STENSVAD CATTLE CO., all Montana Corporations, Plaintiffs, vs. THE MINERS AND MERCHANTS BANK OF ROUNDUP, MONTANA, Defendant.	)	No. 7052

JUDGMENT

Filed 3/12/82

Upon remittitur from the Supreme Court of the State of Montana, judgment is hereby entered in favor of the Plaintiffs and against the Defendant in the amount of $183,721.00, together with interest thereon from the date of entry herein.

Further, pursuant to such remittitur,

such judgment is the amount owed the Plaintiffs by Defendant after set off of all lawful counterclaims of the Defendant against the Plaintiffs.

DATED this 9th day of March, 1982.

s/ R. E. McPhillips

DISTRICT COURT JUDGE

R. E. McPhillips

Office - Supreme Court, U.S.
FILED
JUN 29 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2200

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

THE MINERS AND MERCHANTS BANK
OF ROUNDUP, MONTANA,

Petitioner,

vs.

L. D. STENSVAD, personally and as representative of the investing shareholders of AGRI-SERVICES, INC., M-V ENTERPRISES, INC., M & S CATTLE FEEDERS, and L. D. STENSVAD CATTLE CO., all Montana corporations,

Respondent.

ON WRIT OF CERTIORARI FROM
THE SUPREME COURT OF THE STATE OF MONTANA

BRIEF IN OPPOSITION TO CERTIORARI

Kenneth D. Tolliver, Esq.
Counsel for the Respondent
Suite 2106, Sheraton Plaza
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Billings, MT 59103
(406) 245-3071

1. QUESTION PRESENTED

The question presented is whether the United States Supreme Court should grant Certiorari to review a decision of the Supreme Court of the State of Montana where the State Court's decision did not determine any federal issue, but where the Petition for Certiorari claims that the decision of the State Supreme Court on the substantive issues of Montana law constitutes denial of due process of law as protected by the United States Constitution.

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3. TABLE OF AUTHORITIES

§1257, Title 28, U.S.C.A., cited in brief at pages 1 and 7.

Rule 17 of the Rules of the Supreme Court of the United States, cited in brief at pages 1 and 7.

4. SUMMARY OF ARGUMENT

This case clearly does not meet the criteria for a Grant of Certiorari under §1257, Title 28, USCA. It clearly does not fall within Rule 17 of this Court. During ten years of litigation in the Montana Courts, the Petitioner has raised numerous issues which were heard through numerous trial court proceedings, and two Montana Supreme Court appeals. No federal issue was raised during these many hearings and none was raised on appeal. The Petitioner does not claim the improper disposition of a federal issue. Rather, the Petitioner claims that the Montana Supreme Court's decision itself constitutes a denial of due process.

5. STATEMENT OF FACTS

Respondent summarizes the main facts in this case since they are ignored by the Petitioner.

According to the Findings of the Trial Court, on October 7, 1971, the Petitioner, Miners and Merchants Bank of Roundup, Montana, completely and totally breached a contract to loan money, causing the financial ruin of the Respondents. As part of its breach, the Bank extrajudicially seized and voted the stock of four

corporations owned by the Respondents, thereby obtaining control of the corporations. Later, the Bank suffered judgment to be taken against the corporations it controlled.

At trial and upon appeal, the Montana Courts found a breach of contract and awarded the Plaintiffs (here Respondents) damages.

At no time did the Bank plead any entitlement to interest on these notes if the Court found breach of contract and produced no evidence as to the promissory notes upon which it now claims interest.

6. DECISION OF THE MONTANA SUPREME COURT

The Montana Supreme Court reviewed the trial court's decision that the Petitioner did, on October 7, 1971, unilaterally breach its agreement to finance a large cattle feeding operation and further wrongfully took control of the assets of the Respondents.

In its brief, the Petitioner frequently misstates the nature of the Montana Court's decision.

On Page 27 in Part 8 (a), the Petitioner contends that the Montana Court held that Petitioner was entitled to interest from November 11, 1971, until the spring of

1972, and then arbitrarily denied the Petitioner such interest. This is not true. Having found the Bank's actions wrongful, the Court declines to grant the Bank the opportunity to benefit from its wrong:

> "In view of the fact that the Stensvad property taken by the Bank and sold as collateral for the indebtedness due it, exceeded in value, as we have shown, the amount of the principal indebtedness, it is improper in this case to award interest to the Bank on the note balances to the date of judgment . . . . The Bank is entitled to a setoff of no more than the amount of the principal indebtedness as of the date of the breach found by the District Court". Dec. of Montana Supreme Court, Page A. 130-131 of Pet. Append.

The Petitioner Bank had ample opportunity to present its claim for such interest. The claim was denied because of the Bank's wrongful actions and because the Bank sought double recovery on its legitimate rights.

The Petitioner misleads this Honorable Court when he states that he had been awarded interest "fixing his rights". This never occurred.

Second, Petitioner tries to contend that the Montana Supreme Court found a conversion of real property. This again is simply a falsehood. The Montana Courts awarded damages for a civil wrong — breach of contract. In any event, this issue is clearly not federal in

nature.

Third, Petitioner advances an argument based upon res judicata. This same argument was made at all levels of the proceedings in Montana. It failed because the cases asserted as res judicata were completed when the Petitioner controlled both parties to the cases. Given the facts, the claim of res judicata was clearly frivolous, and was so treated by the Montana Courts.

7. PETITIONER'S CLAIM

Petitioner misconstrues the prior decisions of this Court to argue the novel proposition that an "appeal" on state law issues should be taken by this Court. This argument violates the fundamentals of the State-Federal relationship and ignores the jurisdictional provisions of §1257, Title 28, USCA, and this Court's Rule 17.

Respondent respectfully requests that Certiorari be denied.

KENNETH D. TOLLIVER
Counsel to Respondents
Wright, Tolliver, Guthals,
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Billings, MT 59103
(406) 245-3071

8. APPENDIX

Title 28, §1257, U.S.C.A.

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Consititution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat.

929."

Rule 17, Rules of the Supreme Court of the United States

Considerations Governing Review on Certiorari.

"1. A review on writ of certiorar i is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court

of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court

2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, and of any other court whose judgments are reviewable by law on writ of certiorari."

Office - Supreme Court, U.S.
FILED
JUL 15 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2200

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

THE MINERS AND MERCHANTS BANK
OF ROUNDUP, MONTANA,

Petitioner,

vs.

L. D. STENSVAD, personally and as representative of the investing shareholders of AGRI-SERVICES, INC., M-V ENTERPRISES, INC., M&S CATTLE FEEDERS, and L. D. STENSVAD CATTLE CO., all Montana corporations,

Respondent.

ON WRIT OF CERTIORARI FROM
THE SUPREME COURT OF THE STATE OF MONTANA

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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Saunders v. Shaw, 244 U.S. 317, 61 L.Ed. 1163, 37 S.Ct. 638 .....

Stein v. New York, 346 U.S. 156, 97 L.Ed. 1522, 73 S.Ct. 1077 (dicta) ...

I.

THE UNDISPUTED FACTS INDICATE A DENIAL OF DUE PROCESS BECAUSE CONCEDED FACTS ARE IMPEACHED AND STANDARDS OF JUSTICE ARE USED WHICH ARE CONSTITUTIONALLY IMPERMISSIBLE.

(1) Generally

This Court has indicated it will intervene to review the decision of a state supreme court where there is "impeachment of conceded facts" or where "undisputed facts indicate use of incorrect constitutional standards of justice". Stein v. New York, 346 U.S. 156, 97 L.Ed. 1522, 73 S.Ct. 1077 (dicta).

As to the facts advanced by Petitioner in its Petition for Writ of Certiorari, there are no disputed or conflicting facts or contested inferences as to these facts. Respondent has not in his answer brief sug-

gested otherwise. Thus, to each of the three issues (interest, res judicata, and conversion) raised in the petition herein, the facts are admittedly undisputed.

Respondent's Brief merely offers conclusions as to the meaning of certain court opinions which are contrary to the conclusions actually reached in those opinions. Further, it offers a few claimed facts that are nowhere in the record and are not material to Petitioner's claims.

(2) Conversion Issue

Respondent does not contest any of the facts of record advanced by Petitioner on this issue, nor any of the law.

Respondent only contends that his interpretation of the Montana Supreme Court opinion is that that Court did not find conversion of real property.

The Montana Supreme Court clearly and specifically affirmed an award of $411,935 for what it referred to as "conversion of

feedlot and elevators" (Opinion, p. A-102, Appendix), the "ouster from the feedlots and elevators" (Id., p. A-129), and "property taken by the bank and sold as collateral for the indebtedness due it" (Id., p. A-130). Respondent in his Brief admits this when he characterizes the Montana Supreme Court's decision as one where that Court concluded that Petitioner "wrongfully took control of the assets of the respondents" (Respondent's Brief, p. 5). The definition of conversion is "a wrongful taking", the exact same words used by the Montana Supreme Court and Respondent himself.

Respondent does not contest that: 1) Respondent's complaint in the action sought damages for conversion of real property; 2) The issue of conversion was raised by Petitioner at every stage of the proceedings; 3) Damages for conversion of real estate is not allowed in any jurisdiction;

4) Petitioner raised the conversion issue in terms of due process under the federal Constitution during the rehearing process, which was its first opportunity to do so as to the ruling of the Montana Supreme Court, which ruling could not have been anticipated.

All that is at issue is what the Montana Supreme Court did in its opinion and whether that constituted denial of due process. The Brief of Respondent does not really respond, almost leaving the implication that he concedes this argument.

(3) Interest Issue

Respondent does not contest any of the facts of record advanced by Petitioner on this issue, nor any of the law.

Respondent makes only two contentions: 1) The Petitioner did not plead and prove interest; and 2) Respondent's interpretation of the Montana Supreme Court's Opinion is that that Court did not say Petitioner

was entitled to any interest and denied all of the same because of: a) The bank's wrongful actions; and b) Because the bank sought double recovery.

The first contention is raised here for the first time; at no stage in the earlier proceedings did Respondent urge that Petitioner did not plead for interest. The district court of original jurisdiction awarded interest, and nowhere in Respondent's pleadings or in his briefs to the Montana Supreme Court did Respondent suggest such an award was improper because it had not been pled. Furthermore, the contention is untrue; the collection on all promissory notes (including principal and interest) was included as an issue by stipulation. Much of the injustice of this case arises from just such late arguments advanced by Respondent and accepted by the Montana Supreme Court without an opportunity for Petitioner to be heard on the

matters.

As to the second contention, the Montana Supreme Court explicitly stated that Petitioner was entitled to interest. Interest was denied, however, on the much different contention, namely, there was no evidence in the record from which to calculate the amount:

> "Petitioner bank contended it is entitled to a set-off for interest accrued on the principal indebtedness on the notes from the date of breach until the monies received on foreclosure by the bank were applied on the notes. We so indicated in our opinion. However, we carefully searched the record to determine the applicable amounts and dates, and were unable to identify either in any case."
>
> Opinion, p. A-187, Appendix (emphasis supplied)

That statement appeared in the Court's order denying Petitioner's request for rehearing. While the Montana Supreme Court did deny interest on monies received from foreclosure to date of judgment in the

court of original jurisdiction on the grounds that the Petitioner had taken more property as valued by the court than the principal indebtedness due the Petitioner, nowhere did the Montana Supreme Court state that interest to the date monies were received on foreclosure was not available because of any wrongful taking or because of any double recovery.

All that is at issue is whether the amount of such interest that the Montana Supreme Court held the Petitioner was entitled to was or was not determinable from undisputed facts before that Court.

Respondent does not, by his silence on the points, dispute that: 1) Petitioner at every stage in the appeal (up to the Court's order denying Petitioner's request for a rehearing) urged without objection or contrary argument from Respondent that the amount of interest from the date of taking of the properties to the date of sale was

proposed as a stipulation by counsel for Respondent and so stipulated by Petitioner's counsel to be $35,962.93 after all set-offs; 2) Prior to the Court's order denying Petitioner's request for a rehearing, there had been no suggestion by the Court or Respondent that the amount of interest was even at issue in the case; 3) After the Montana Supreme Court's denial of the request for rehearing, which was timely, no mechanism existed for further review under Montana law or court rule; 4) Petitioner, in raising the due process question for the first time in its Petition for Writ of Certiorari raised the issue at its first opportunity to do so, and the Court's ruling could not have been anticipated. The Montana Supreme Court's decision, therefore, involves impeachment of conceded facts.

(4) Res Judicata Issue

Respondent does not contest any of the

facts of record advanced by Petitioner on this issue and contests none of the law.

Petitioner urged the following: 1) In separate legal actions involving the same parties and property, both real and personal, Petitioner, in a lawful manner and under court authority, proceeded to repossess, foreclose, and reduce to money judgment certain claims of Petitioner; 2) None of the judgments were appealed or set aside or collaterally attacked; 3) Petitioner, at all stages from the inception of the suit through the appeal, prominently and properly raised the issue of res judicata; 4) The doctrine that an existing final judgment rendered upon the merits without fraud or collusion, by a court of competent jurisdiction, is conclusive of causes of action and of facts or issues thereby litigated, as to the parties and their privies, in all other actions in the same or any other court of concurrent jurisdiction, is

well-recognized in Montana; 5) At no time has a court in this case, including the Montana Supreme Court, responded to Petitioner's prominent argument or suggested that it lacked merit; and 6) Petitioner raised the res judicata issue in terms of due process under the federal Constitution during the rehearing process, which was its first opportunity to do so as to the Montana Supreme Court, which ruling could not have been anticipated.

Respondent advances only two matters on this issue. The first is that the Montana courts treated the issue as "clearly frivolous". (Respondent's Brief, p. 7). This is palpably contradicted by the record of opinions set forth in Petitioner's Appendix. No reference to this issue exists in any of the Montana Supreme Court's or the lower court's orders or opinions. The failure and refusal of a court to deal with a prominent argument

does not constitute a treatment of clear frivolity. Rather, if anything, it suggests support for Petitioner's contention that constitutionally-required standards of justice have not been observed.

Here again, as with other matters previously advanced, there is a disagreement by the parties as to the meaning of the Montana Supreme Court's opinion, but no issue as to evidence and facts of record, nor any conflict in the inferences to be drawn from them.

Respondent's second contention on this issue involves a claimed fact (raised for the first time here) that: a) Is not established in the record; and b) Is actually contradicted by the record.

That contention of Respondent, at pp. 4-5 of his Brief, is that Petitioner "extrajudicially seized and voted the stock of four corporations owned by the Respondents, thereby obtaining control of the

corporations. Later, the bank suffered judgment to be taken against the corporations it controlled".

Respondent neither cites to the record nor appends any part of the record to give support to his proposition first raised here. The reason he cannot do so is that there is no evidence of record in this entire case that even comes close to establishing this proposition.

There is some uncontradicted evidence in this case which tends to show the falsity of the last-minute collateral attack on the judgments. The Order of April 11, 1972 set out in the Appendix at p. A-14 specifically refers to both parties appearing through counsel, that case being one of the judgments referred to as being res judicata as to this case. The order and judgment in that case were judicially noticed by the lower court of original jurisdiction in the instant case.

If Respondent truly wishes to urge that this Court or any court look to the files of the case set out in the Appendix at p. A-14 and deal with Respondent's collateral attack, that court will find that Respondent's law firm regularly appeared in and represented Respondent at all stages and will find that the very issue of such asserted ownership and control was raised in that case and disposed of in Petitioner's favor through the Summary Judgment at page A-16 of Petitioner's Appendix, which judgment reflects that the lower court granted "summary judgment in favor of Plaintiff and against Defendants and each of them on all issues". It is uncontested that Respondent did not appeal that judgment.

In fact, the move to summary judgment on that issue was advanced by Respondent, as reflected in the Motion for Summary Judgment appended hereto, and signed by

Respondent's previous counsel, Charles F. Moses (the same counsel who initially appeared for Respondent in the instant case).

In any event, such a contention amounts to a collateral attack which is beyond the pleadings of this case.

(5) Financial Ruin of Respondents

Nowhere in the findings of the court of original jurisdiction is there any reference to the Petitioner "causing the financial ruin of Respondents" (Brief of Respondent, p. 4). In any event, the presence or absence of this claimed fact, unsupported by the record, has no bearing on the merits of any fact or argument advanced by Petitioner.

WHEREFORE, IT IS RESPECTFULLY SUBMITTED constitutional standards of justice have been ignored and conceded facts have been impeached sufficient to warrant review by This Court, and the Petition for a Writ of Certiorari should be granted.

II.

PETITIONER RAISED THE CONVERSION AND RES JUDICATA ISSUES IN TERMS OF DUE PROCESS UNDER THE FEDERAL CONSTITUTION DURING THE REHEARING PROCESS AND THE INTEREST ISSUE AFTER THE PETITION FOR REHEARING WAS DENIED, WHICH WAS ITS FIRST OPPORTUNITY TO DO SO AS TO EACH RULING OF THE MONTANA SUPREME COURT, WHICH RULINGS COULD NOT HAVE BEEN ANTICIPATED.

It is understood that the general rule is that a constitutional question is urged too late if put forward on a petition for rehearing.

There is a well-recognized exception to the general rule where the decision of the state's highest court is the act complained of, and it could not have reasonably been anticipated.

Thus, in Great Northern R. Co. v. Sunburst Oil & Ref. Co. (1932), 287 U.S. 358, 77 L.Ed. 360, 367-68, 53 S.Ct. 145, 85 ALR 254, where the first mention of the 14th Amendment to be found in the record was in the Petition for Rehearing, the Court spoke to the "well-recognized exception" and stated:

> "The rule, general as it is, does not extend to cases . . . where the grounds of the decision supply a new and unexpected basis for a claim by the defeated party of the denial of a federal right."

And, in Missouri ex. rel. Missouri Ins. Co. v. Gehner (1930), 281 U.S. 313, 74 L.Ed. 870, 50 S.Ct. 326, where it was claimed that a calculation by the State Supreme Court denied U.S. constitutional rights, the Petitioner for a Writ of Certiorari first raised the federal question in a Motion for Rehearing, and the State Supreme Court did not refer to the federal question in denying the petition. The

Court noted the exception applicable in this case:

> "It is well settled that this court will not consider questions that were not properly presented for decision in the highest court of the state. Ordinarily it will not consider contentions first made in a petition to the state court for rehearing where the petition is denied without more. [citation]. But here the company, at the first opportunity invoked the protection of the federal constitution and statute. It would not earlier have assailed the section as violative of the constitution and laws of the United States."
>
> Ibid, at p. 875.

And, in Herndon v. Georgia, 295 US 441, 79 L.Ed. 1530, 55 S.Ct. 794, the Court focused the test for the exception on whether the State Supreme Court's decision could have been anticipated by a reading of prior decisions, holding that the assertion of a federal claim in a petition for rehearing was not timely where the State Supreme Court's decision could have been

anticipated by a reading of prior decisions and noting at page 1533:

> "There is no doubt that the federal claim was timely if the ruling of the state could not have been anticipated and a petition for rehearing presented the first opportunity for raising it. [citation]. The whole point, therefore, is whether the ruling here assailed should have been anticipated."

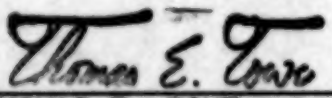
Even where a federal question under due process and the 14th Amendment was not raised until after the State Supreme Court had refused to consider an application for rehearing, the federal question was timely raised in Saunders v. Shaw, 244 US 317, 61 L.Ed. 1163, 37 S.Ct. 638, the Court stating:

> ". . . when the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here. The defendant was not bound to contemplate a decision

of the case before his evidence was heard, and therefore was not bound to ask a ruling or to take other precautions in advance. The denial of rights given by the 14th Amendment need not be by legislation."

WHEREFORE, IT IS RESPECTFULLY SUBMITTED the Petition for Writ of Certiorari should be granted.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, THOMAS E. TOWE, attorney for Miners & Merchants Bank, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on July 12, 1982, I served three (3) copies of the foregoing Reply Brief in Support of Petition for Writ of Certiorari on the Respondent herein, by mailing the

copies in a duly addressed envelope, with first class postage prepaid, to Ken Tolliver, Esq., Attorney of Record for Respondent, at Post Office Box 1977, Billings, Montana, 59103.

Thomas E. Towe

THOMAS E. TOWE
Counsel for Petitioner
2525 Sixth Avenue North
Billings, Montana 59101

IN THE DISTRICT COURT OF THE FOURTEENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF MUSSELSHELL

NO. 7054

THE MINERS AND MERCHANTS BANK OF ROUNDUP, MONTANA,

Plaintiff,

-vs-

AGRI-SERVICES, INC., L.D. STENSVAD, M & S CATTLE FEEDERS, M-V ENTERPRISES, INC. and L.D. STENSVAD CATTLE CO.,

Defendants.

MOTION FOR SUMMARY JUDGMENT

COMES NOW L. D. Stensvad, defendant herein, and respectfully moves the Court for summary judgment in the above entitled action. This motion is made and based upon the following:

1. That the Miners and Merchants Bank have asserted ownership and control over Agri-Services, Inc., M & S Cattle Feeders, M-V Enterprises, Inc., and are now in com-

plete control and charge of said corporations and that the same is in full satisfaction of all claims and does, as a matter of law, release the guarantor from any obligation.

2. That the Miners and Merchants Bank have asserted ownership and control over Agri-Services, Inc., M & S Cattle Feeders, M-V Enterprises, Inc., and are now in control of said corporations so as to alter the original obligations between the parties and to impair the remedies or rights of the parties in respect thereto.

This motion is based upon the records and files in the District Court of the Fourteenth Judicial District of the State of Montana in and for the County of Musselshell, and will be supported by oral testimony to be presented at the time of the hearing.

DATED this 4th day of May, 1972.

SANDALL, MOSES & CAVAN
2501 Fourth Avenue North
Billings, Montana 59101

By Charles F. Moses
Attorneys for Defendants

Attachment-3